

# Threat to the Peace: A Call for the UN Security Council to Act in Burma



## Report Commissioned By:

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## Prepared By:



September 20, 2005

\* In this report, the country examined is referred to as Burma rather than Myanmar. This is the form preferred by the leaders of Burma's democracy movement, the legitimate winners of the 1990 elections. They do not accept that the unelected military regime has the right to change the official name of the country to suit its own ends.

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## Foreword

Our interest in Burma goes back many years as we have followed its struggle to achieve peace and national reconciliation. The spotlight is again on Burma for a number of reasons, including the fact that Aung San Suu Kyi—the world's only imprisoned Nobel Peace Prize Laureate, who has spent much of the last 16 years under house arrest—celebrated her 60th birthday last June.

In recent years, it has become clear that Burma's troubles are causing serious and possibly permanent problems that go well beyond human rights violations. Burma has now become a problem for the region and international community. We commissioned the global law firm of DLA Piper Rudnick Gray Cary to prepare an objective and definitive report on the threat that the Government of Burma poses both to its own people and to regional peace and security. The evidence and facts contained in the report make it abundantly clear that the UN Security Council should become engaged in Burma as soon as possible. For this reason, the report analyzes the criteria for bringing the situation of a particular country to the UN Security Council, summarizes the relevant problems and challenges in Burma, and places these issues in the context of past Security Council interventions.

Based on our review of this report and its recommendations, we strongly urge the UN Security Council to take up the situation of Burma immediately. Preserving peace, security, and stability in the region and world—as well as achieving national reconciliation in Burma—now requires nothing less.



President Václav Havel  
Former President of the Czech Republic



Bishop Desmond M. Tutu  
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# Map of Burma



Source: CIA World Factbook 2005

## Table of Acronyms

AFPFL	Anti-Fascist People's Freedom League
ASEAN	Association of Southeast Asian Nations
ASEM	Asia Europe Meeting
ATS	Amphetamine-Type Stimulants
ECOWAS	Economic Community of West African States
EU	European Union
FATF	Financial Action Task Force
GATT	General Agreement on Tariffs and Trade
IDP	Internally Displaced Person
ILO	International Labor Organization
IMF	International Monetary Fund
KNPP	Karen National Progressive Party
KNU	Karen National Union
MEC	Myanmar Economic Corporation
MP	Member of Parliament
NCGUB	National Coalition Government of the Union of Burma
NLD	National League for Democracy
NPFL	National Patriotic Front of Liberia
NUP	National Unity Party
OAS	Organization of American States
RPF	Rwandese Patriotic Front
RUF	Revolutionary United Front
SLORC	State Law and Order Restoration Council
SNLD	Shan Nationalities League for Democracy
SPDC	State Peace and Development Council
UMEH	Union of Myanmar Economic Holdings
UN	United Nations
UNAIDS	Joint United Nations Program on HIV/AIDS
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific, and Cultural Organization
ULIMO	United Liberation Movement of Liberia
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
USWA	United Wa State Army
WFP	World Food Program

# Executive Summary

## The Situation in Burma

- The situation in Burma continues to deteriorate with no degree of measurable improvement. Members of the international community, including governments, coalitions of governments, non-governmental organizations and many United Nations (UN) bodies, have reported grave human rights violations, sustained conflict between the Government of Burma (the State Peace and Development Council, or SPDC) and ethnic factions, and failures by the SPDC to move forward in any meaningful way with the national reconciliation it promised in its “roadmap” to democracy. As a result of the SPDC’s refusal to implement recommendations made by the UN—in particular by the Office of the Secretary-General—Burma threatens the peace and stability of the region. Therefore, UN Security Council (Security Council) action is both warranted and necessary.

## Powers of the UN Security Council

- Charged with the critical mission of maintaining peace and security between nations, the UN Security Council possesses unparalleled authority to make binding decisions that uphold the United Nations’ commitment to prevent war, preserve human rights, and promote international political stability.
- Under Chapter VII, Article 39 of the UN Charter, the Security Council possesses sole authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.” As articulated in Article 33 of the Charter, whenever the Council “deems necessary,” at “any stage” of a dispute, it may intervene “to ensure prompt and effective action” to safeguard peace and security.
- Action by the Security Council can include the adoption of simple and clear resolutions requiring action on the part of the offending government or group to curtail its aggressive or threatening acts, sanctions against the perpetrating government or group, or the authorization of a UN peacekeeping force to enter the territory. Under Article 25 of the UN Charter, all members of the UN “agree to accept and carry out the decisions of the Security Council.”
- Relying on Chapter VII, the Security Council has intervened in such countries as Sierra Leone, Afghanistan, Haiti, Yemen, Rwanda, Liberia, and Cambodia when it determined the situations in those countries to constitute a “threat to the peace” that required intervention to protect and preserve international stability. Although there is no precise definition of what represents a “threat to the peace,” the Security Council—through its past actions on a case-by-case evaluation—has elucidated a list of factors that can collectively constitute such a threat to the peace.
- Because the Security Council takes a case-by-case approach, no one factor or set of factors is dispositive. Each past case was a unique set of circumstances; the Security Council considered the totality of each situation in determining that a threat to the peace was taking place.

## UN Security Council Action and Burma

- To guide our work, we first reviewed initial Security Council resolutions that were adopted in response to internal conflict situations (when a government was in control of the country) that the Security Council deemed a threat to the peace. This review enabled us to identify the criteria that helped the Council make its decisions. These criteria are utilized in this report as the determining factors relevant to the case of Burma. These factors include: (1) the overthrow of a democratically-elected government; (2) conflict among governmental bodies and insurgent armies or armed ethnic

groups; (3) widespread internal humanitarian/human rights violations; (4) the substantial outflow of refugees; and (5) other cross-border problems (for instance, drug trafficking).

- All the cases of internal conflict in which the Security Council has become engaged have included some of these factors. But Burma is unique in today's world: only there are all five factors present.

### Assessment of Determining Factors Resulting in UN Security Council Intervention

	Resolution	Overthrow of Democratic Government	Conflict Among Factions	Human. / Human Rights Violations	Refugee Outflows	Other (Drug Trafficking)	Other (HIV/AIDS)
Sierra Leone	S.C. 1132 (1997)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Afghanistan	S.C. 1076 (1996)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Yemen	S.C. 924 (1994)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Haiti	S.C. 841 (1993)	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Rwanda	S.C. 812 (1993)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Liberia	S.C. 788 (1992)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Cambodia	S.C. 668 (1990)		<input checked="" type="checkbox"/>				

<b>Burma</b>	-	<input checked="" type="checkbox"/>					
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- Furthermore, the extent to which some of these factors exist in Burma is considerably worse than in other countries in which the Security Council has chosen to act:
  - *Overthrow of Democratically-Elected Government:* A military regime overthrew the democratically-elected government in 1962. In 1990, the military regime permitted elections to take place. The result: the National League for Democracy (NLD) became the democratically-elected government of Burma, winning more than 80 percent of the seats in Parliament. The NLD was never permitted to take power and NLD members have since been harassed, jailed, and murdered. NLD leader Aung San Suu Kyi has remained under house arrest in Burma since 1990 with only intermittent periods of release.
  - *Conflict Between Central Governments and Ethnic Factions:* Serious, protracted fighting between the SPDC and various ethnic groups seeking autonomy and freedom from oppression has been consistent and ongoing, even in areas where non-binding ceasefire agreements have been made.
  - *Widespread Internal Humanitarian/Human Rights Violations:* The SPDC has committed grave, systematic, and widespread human rights abuses against the people in Burma, including violations similar to but even worse than in other cases previously considered by the Security Council. Some violations that are unique to Burma, or particularly pervasive, include the destruction of more than 2,700 villages since 1996, massive forced relocations, rape of ethnic minorities by SPDC soldiers, and widespread forced labor. As many as 70,000 children have

been forced to become soldiers by the regime—more than in any other country in the world. Additional violations include the denial of political rights and free speech, harassment of political activists, torture, and murder.

- *Outflow of Refugees:* Almost 700,000 refugees have poured out of Burma in recent years as a result of the grave conditions created by the Government of Burma. The government is responsible for a decline in the economic situation so alarming that Burma is now one of the poorest countries in the world, providing its people little or no access to health care or education.
- *Drug Production and Trafficking:* Burma is one of the world's leading producers of heroin and amphetamine-type stimulants. The trafficking and use of these drugs are of enormous concern to the international community and to the region particularly.
- In addition to those factors considered in prior cases by the Security Council, the Security Council adopted Resolution 1308 in 2000 calling attention to the threat that the spread of HIV/AIDS poses to international security. Burma has been a primary contributor to the spread of HIV/AIDS in Southeast Asia. Because Burma is the heroin supplier for the region, HIV strains that originated there are now spreading to neighboring countries along the heroin routes. The flourishing sex industry is another conduit enabling HIV to spread within Burma itself.

## **Conclusion**

- While Burma is similar to the other countries considered in this report, in that all of the factors taken from relevant Security Council resolutions are present in Burma, the situation in Burma is particularly unique, especially considering the severity of those factors. Additionally, in no prior cases do other distinguishing factors appear, such as Burma's contribution to the spread of HIV/AIDS. The persistence of these circumstances in Burma and the region, in conjunction with the failure of the regime to implement any reform or enable outside organizations to facilitate progress, makes the overall magnitude of the threat to peace in Burma substantially higher than it was in cases where the Security Council has acted in the past.
- As a result of the severity of the overall situation in Burma and in consideration of all of these factors, which are analyzed in detail in this report, the situation in Burma constitutes "a threat to the peace," thereby authorizing Security Council action. Binding Security Council intervention is a necessary international and multilateral vehicle to restore the peace, promote national reconciliation, and facilitate a return to democratic rule.

## **Recommendations**

The UN Security Council should adopt a resolution on the situation in Burma in accordance with its authority under Chapter VII of the UN Charter (Article 41) and past Security Council precedents.

The resolution should:

- Outline the major reasons for the Security Council intervention, focusing on the threat to the peace caused by the major issues described in this report;
- Require the Government of Burma to work with the Secretary-General's office in implementing a plan for national reconciliation and a restoration of a democratically-elected government;

- Request the Secretary-General to remain vigorously engaged with the dispute resolution process and require that he report back to the Security Council on a regular basis;
- Urge the Government of Burma to ensure the immediate, safe, and unhindered access to all parts of the country for the United Nations and international humanitarian organizations to provide humanitarian assistance to the most vulnerable groups of the population, including internally displaced persons; and
- Call for the immediate and unconditional release of Aung San Suu Kyi and all prisoners of conscience in Burma.

## **I. Background on the Situation in Burma**

### **A. Political History**

#### **1. Early History**

In Burma's early history, three main dynasties unified and ruled the country, including the Pagan Dynasty from 1044-1287, the Toungoo Dynasty from 1486-1752, and the Konbaung dynasty from 1752-1824.<sup>1</sup> In 1824, the British began their attempts to conquer Burma. Only with the last Anglo-Burman War, ending in 1885, did the British gain complete control of Burma. The country became a province of British India, governed by a colonial administration and allowed limited local self-government.<sup>2</sup> In 1937, the British separated Burma from India.<sup>3</sup> During World War II, the Japanese invaded and occupied Burma, helped by the Japanese-trained Burma Independence Army.<sup>4</sup>

Then in March 1945, members of the Burma Independence Army, led by General Aung San, switched sides and helped form the Anti-Fascist People's Freedom League (AFPFL), an anti-Japanese resistance movement.<sup>5</sup> Allied forces, the AFPFL, and leading ethnic groups, including the Karen and others, liberated Burma from Japanese occupation later that year.<sup>6</sup>

#### **2. Independence**

After Burma was liberated from Japanese occupation, Aung San—who had become Burma's founding father—and the British government reached an agreement that granted Burma her independence, effective in January 1948. Unfortunately, before Burmese independence became a reality, Aung San was assassinated.<sup>7</sup>

The constitution of the newly-independent Burma provided for a bicameral legislature with a prime minister and cabinet.<sup>8</sup> Non-Burman areas were organized as the Shan, Kachin, Kayin, Kaya, and Chin states, with each state having a degree of autonomy.<sup>9</sup> From 1948-1962, Burma operated as a democracy with a representative government. However, internal struggles among political, social, and ethnic groups persisted during this period.<sup>10</sup>

#### **3. Military Coup**

In 1958, Prime Minister U Nu invited the military, led by General Ne Win, to restore order to the country.<sup>11</sup> The AFPFL split into two factions that same year, and U Nu's faction won the elections in

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<sup>1</sup> See *Background Note: Burma*, U.S. Department of State (Dec. 2004), available at <http://www.state.gov/r/pa/ei/bgn/35910.htm> (hereinafter, *Background Note*); see also *Myanmar: History*, COLUMBIA ENCYCLOPEDIA (6th ed. 2005), available at [http://www.encyclopedia.com/printable.asp?url=/ssi/section/myanmar\\_history.html](http://www.encyclopedia.com/printable.asp?url=/ssi/section/myanmar_history.html) (hereinafter *Myanmar: History*).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See Josef Silverstein, *The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi*, PACIFIC AFFAIRS, Vol. 69, No. 2, 1996, at 212.

<sup>8</sup> See *Myanmar: History*, *supra* note 1.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

1960.<sup>12</sup> After the 1960 election, civilian government was restored. Then, in 1962, General Ne Win staged a military coup and took control of the government.<sup>13</sup> Ne Win abolished the constitution and established a xenophobic military government.<sup>14</sup> Ne Win instituted the “Burmese Way to Socialism,” effectively cutting off Burma from the rest of the world.<sup>15</sup> In 1974, a new constitution took effect which provided for a unicameral legislature and only one legal political party, the Burma Socialist Program Party.<sup>16</sup> During the Ne Win regime, armed resistance by the Communist Party of Burma and ethnic nationalities not only continued but, in some areas, increased; the regime was engaged in frequent military operations against both.<sup>17</sup>

Under Ne Win’s regime, Burma’s economy deteriorated. Following the expulsion of many foreign nationals, the government nationalized most of the private sector. It handed over administrative control of various industries to inexperienced military officers.<sup>18</sup> As the economic situation worsened, the country suffered from a lack of development and sank deeper into bankruptcy.<sup>19</sup>

#### **4. 8/8/88**

In 1987, Burma’s economy collapsed. The government demonetized the currency, wiping out many people’s savings.<sup>20</sup> Rice shortages were rampant.<sup>21</sup> Non-violent anti-government demonstrations broke out in Rangoon.<sup>22</sup> Students and Buddhist monks led the protest movement, calling for reform and a regime change. The general public joined the students, as did civil servants and members of the armed forces, and the demonstrations grew in size.<sup>23</sup> On August 8, 1988, military forces took violent action against the demonstrators, killing thousands.<sup>24</sup>

After the August 8, 1988 massacre, a new group of military leaders took power. They abolished the constitution and established a new ruling military junta called the State Law and Order Restoration Council (SLORC). The SLORC ruled by martial law and continued the crackdown on anti-government demonstrations—resulting in many more deaths.<sup>25</sup> In 1989, the military government unilaterally changed the name of the country from Burma to Myanmar.<sup>26</sup>

Aung San Suu Kyi, the daughter of General Aung San, made her first political speech at a rally after the 1988 massacre. With this speech she emerged as the leader of the opposition, the National

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<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*; see also John V. Dennis, Ph.D., *A Review of National Social Policies: Myanmar*, 1999, available at [www.mekonginfo.org](http://www.mekonginfo.org). (hereinafter Dennis Report).

<sup>17</sup> See *Burma: Time for Change: Report of Independent Task Force*, Council on Foreign Relations, Jun. 2003 (hereinafter Time for Change).

<sup>18</sup> See Dennis Report, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> See Bertil Lintner, *Outrage: Burma’s Struggle for Democracy*, White Lotus Books, 1990, at p. 192; see also Alan Berlow, *Notes on a Fascist Disneyland: Behind Burma’s Enchanting Façade, a Police State Tightens the Screws*, LOS ANGELES TIMES, May 20, 1990, p. 22 (hereinafter Fascist Disneyland).

<sup>21</sup> See Dennis Report, *supra* note 16. The report noted the sharp rise in food prices. Even low-grade rice increased sevenfold from 8 kyats/unit in 1988 to 54 kyats/unit in 1996. *Id.*

<sup>22</sup> See Background Note, *supra* note 1.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* Myanmar is an English transliteration of “Burma” from Burmese. The NLD rejects the name change. The United Nations uses the name Myanmar; however, the U.S., British, and other governments continue to use the name Burma. The name of the capital city, Rangoon, also was changed to Yangon. See also Time for Change, *supra* note 17, at 8 n. 1.

League for Democracy (NLD).<sup>27</sup> In 1989, fearing the growing popular support for Aung San Suu Kyi and the NLD, the military government placed her under house arrest.<sup>28</sup> Nevertheless, to quell increasing public discontent against military rule, in early 1990 SLORC announced a multiparty democratic election.<sup>29</sup>

## **5. Democratic Election**

On May 27, 1990, the SLORC held a general election for voters to choose a parliament, Burma's first multiparty election in nearly 30 years.<sup>30</sup> Even though Aung San Suu Kyi remained under house arrest, her NLD party received an overwhelming majority of the votes, winning over 80 percent of parliamentary seats.<sup>31</sup> The NLD victory caught the military regime by surprise; the regime did not know how to react to the election results.<sup>32</sup> Some commentators argue that the SLORC never meant to relinquish power to any other group.<sup>33</sup> After the election, the SLORC delayed the transition of power and the meeting of the newly elected assembly, asserting that if any political party convened a parliament and formed a government, then such a government would be only a "parallel government" because the SLORC remained the "legal government."<sup>34</sup>

The NLD demanded that the SLORC allow the elected assembly to meet by September 1990.<sup>35</sup> As months passed, it became clear that the SLORC had no intention of allowing the democratically-elected representatives to convene. After the election, and despite the overwhelming victory of the NLD, the SLORC continued to arrest and jail political activists and members of the NLD.<sup>36</sup> Moreover, Aung San Suu Kyi and General U Tin Oo, the chairman of the NLD party, continued to be held under house arrest.<sup>37</sup> More than 20 elected MPs have died while in prison.<sup>38</sup> Because of the clampdown on political opposition after the election, some of the elected representatives fled Burma and established the National Coalition Government of the Union of Burma (NCGUB).<sup>39</sup> The UN General Assembly unanimously condemned the Government of Burma for its refusal to recognize the democratically-elected parliament.<sup>40</sup> To this day, the military regime still prohibits the elected assembly from convening.

## **6. Recent History**

In 1991, Aung San Suu Kyi was awarded the Sakharov Prize for Freedom of Thought from the European Parliament. Later that same year, she received the Nobel Peace Prize for her "non-violent

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<sup>27</sup> See *id.*

<sup>28</sup> See Time for Change, *supra* note 17, at 8.

<sup>29</sup> See Dennis Report, *supra* note 16.

<sup>30</sup> See *id.*; see also Background Note, *supra* note 1.

<sup>31</sup> See Dennis Report, *supra* note 16.

<sup>32</sup> See Terry McCarthy & Yuli Ismartono, *Opposition Vote Leaves Burma's Rulers Stunned*, THE INDEPENDENT, Jun. 15, 1990, p. 11.

<sup>33</sup> See Fascist Disneyland, *supra* note 20 (stating that "virtually everyone believes that [the election] will be an unmitigated fraud").

<sup>34</sup> Maj. Gen. Khin Nyunt at the 100<sup>th</sup> SLORC Press Conference, on Jul. 13, 1990, stated: "[i]f a political party convenes a parliament and forms a government according to its own wishes, then such a government can only be a parallel government. If that happens, the SLORC Government, which is a legal government, will not look on with folded arms" available at: <http://www.ibiblio.org/obl/docs/DT-Elections.html>, last visited Sept. 1, 2005.

<sup>35</sup> See *id.*

<sup>36</sup> See Roger Matthews, *Burmese Troops Stand By to Crush Demonstrations: Second Anniversary of Brutal Suppression of Democracy Movement*, FINANCIAL TIMES, Sept. 18, 1990.

<sup>37</sup> See *id.*

<sup>38</sup> See, e.g., Moe Aye, *Uphill Battle for NLD*, available at [http://www.aappb.net/ma\\_nld1.html](http://www.aappb.net/ma_nld1.html), last visited Sept. 1, 2005.

<sup>39</sup> See, e.g., About the NCGUB, available at

<http://www.burmafund.org/Pathfinders/ncgub/background%20of%20the%20ncgub.htm>, last visited Sept. 1, 2005.

<sup>40</sup> See Myanmar: History, *supra* note 1.

struggle for democracy and human rights.”<sup>41</sup> In 1992, General Than Shwe became head of the military junta and prime minister of Burma.<sup>42</sup> He announced plans to draft a new constitution and released some political prisoners, but some experts believed the military never planned to restore civilian government.<sup>43</sup> The government next claimed that the 1990 election had been held solely to elect members to a body that would convene to draft a new constitution; in January 1993, the government convened a national convention to begin this process. However, only 15 percent of the delegates to the national convention had been elected in the 1990 election; the majority of the delegates were appointed by the military junta.<sup>44</sup> In 1995, the NLD walked out of the convention, protesting restrictions on debate, and its delegates were subsequently expelled for being absent without permission.<sup>45</sup> The convention closed in 1996 without completing a constitution.<sup>46</sup> The government released Aung San Suu Kyi from house arrest in 1995, but restricted her movements and her NLD political activities.<sup>47</sup>

In 1997, after retaining an international public relations firm, the junta changed its name from SLORC to the more benign-sounding State Peace and Development Council (SPDC).<sup>48</sup> The 19-member SPDC includes four generals who had held top positions in the SLORC, as well as a number of new generals, including heads of the navy and air force and commanders of military zones.<sup>49</sup> Initially, the formation of this new governing body prompted hopes for political reform. But since then, the change from SLORC to SPDC has come to be viewed as cosmetic: like the SLORC, the SPDC has failed to implement political or economic reforms.<sup>50</sup>

The SPDC also continued to maintain a hard-line stance against Aung San Suu Kyi and the NLD. It took harsh measures to repress democratic opposition. In 1999, the SPDC prohibited Aung San Suu Kyi’s British husband—who was dying—from visiting her in Burma; Aung San Suu Kyi was unable to leave the country out of fear that the SPDC would not allow her to return.<sup>51</sup> In late August 2000, while on the way to a meeting with NLD supporters, Aung San Suu Kyi and a convoy of NLD members faced a standoff with the military government in Dala, a small town south of Rangoon.<sup>52</sup> The two-car convoy, which carried Aung San Suu Kyi and 14 NLD members, was stranded by the roadside for a week.<sup>53</sup> In the end, 200 riot police surrounded the cars in a midnight raid and forced her and her convoy to return to

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<sup>41</sup> *Press Release*, NORWEGIAN NOBEL COMMITTEE, 1991, available at <http://nobelprize.org/peace/laureates/1991/press.html>; *see also Freedom Prize for Detained Leader*, THE INDEPENDENT, Jul. 11, 1991.

<sup>42</sup> *See id.* Than Shwe is known as the most hard-line military officer and is “strongly opposed to allowing any political role for opposition leader Aung San Suu Kyi.” *See Burma’s Hardline Generals*, BBC NEWS, Nov. 23, 2004, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/3755684.stm> (hereinafter *Hardline Generals*).

<sup>43</sup> *See id.*

<sup>44</sup> *See Country Profile 2004: Myanmar (Burma)*, THE ECONOMIST, at 16 (hereinafter *Economist Country Profile*).

<sup>45</sup> *See Burma 1995: The Year in Review*, BurmaNet News Issue #313, available at <http://www.ibiblio.org/freeburma/bnn/bnn1995.html>, last visited Sept. 3, 2005.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*; *see also* Time for Change, *supra* note 17, at 8.

<sup>48</sup> *See Myanmar: History*, *supra* note 1; *see also* David Lamb, *Myanmar: New Military Rulers Continue an Old Regime of Repression*, LOS ANGELES TIMES, Jul. 10, 1998, p. 5.

<sup>49</sup> *See* Chao-Tzang Yawngwe, *Burma’s Military Politics*, IRAWADDY MAGAZINE, Vol. 5, No. 7, Dec. 1997, available at [www.irrawaddy.org/database/1997/vol5.7/militarypolitics.html](http://www.irrawaddy.org/database/1997/vol5.7/militarypolitics.html).

<sup>50</sup> *See* Background Note, *supra* note 1.

<sup>51</sup> Aung San Suu Kyi’s British husband, Michael Aris, was teaching at Oxford University and was diagnosed with prostate cancer. In a rare display of unity, the international community called on the government to grant his request for a visa to enter Burma. The government denied his request. Aris died in 1999 without seeing his wife again. *See generally* Nicole Veash, *Suu Kyi Mourns Husband: Burmese Junta Traps Nobel Laureate as Cancer Kills 53-Year-Old Partner*, THE OBSERVER, Mar. 28, 1999, p. 3; Seth Mydans, *Myanmar Opposition Leader’s Husband Dies, Denied a Last Visit*, THE NEW YORK TIMES, Mar. 28, 1999, Section 1, Pg. 8; and *Suu Kyi Husband near Death*, THE AUSTRALIAN, Mar. 19, 1999, p. 7 (reporting that Australia may join an international appeal, including Malaysia, Japan, Thailand, Singapore, the US, and the UN, to Burma’s junta to allow Aris to visit Aung San Suu Kyi in Burma).

<sup>52</sup> *See, e.g.*, Seth Mydans, *Burma Leader Forced Home; Standoff Ends*, THE NEW YORK TIMES, Sept. 3, 2000.

<sup>53</sup> *See id.*

Rangoon.<sup>54</sup> In response to this incident in Dala, UN Secretary-General Kofi Annan called on the Government of Burma to resolve the political stalemate and engage in political dialogue with the NLD.<sup>55</sup> The government refused. Instead, shortly after the Dala incident, Aung San Suu Kyi was again placed under house arrest, and remained there from September 2000 to May 2002.<sup>56</sup>

After Aung San Suu Kyi's release in 2002, and for the first time in 13 years, the military regime allowed her to travel throughout the country.<sup>57</sup> The regime also released several hundred political prisoners and allowed approximately 90 of the 400 NLD offices in the country to reopen.<sup>58</sup> Then on May 30, 2003, a government-affiliated militia attacked Aung San Suu Kyi and her convoy of supporters as they traveled outside Mandalay.<sup>59</sup> The SPDC reported four deaths as a result of the attack, but eyewitnesses reported far more than the official number, with eyewitness estimates rising as high as 70 deaths.<sup>60</sup> According to eyewitnesses, police were present during the attack.<sup>61</sup> Reports also claim that common criminals were taken from prison and trained to take part in the attack.<sup>62</sup>

This incident was one of the most violent confrontations between the government and NLD supporters since the uprising in 1988.<sup>63</sup> Next, the government detained Aung San Suu Kyi and the other NLD members, blaming them for the violence.<sup>64</sup> The government then not only closed all NLD offices but schools and universities throughout the country (the NLD headquarters in Rangoon was permitted to reopen shortly thereafter).<sup>65</sup> More than 100 democracy activists were arrested, and at least a dozen were imprisoned.<sup>66</sup> Although the government has stated that the house arrest of Aung San Suu Kyi and NLD Vice Chairman U Tin Oo is for "protective custody" and "only temporary," both leaders have remained under house arrest since then.<sup>67</sup> The government also has prohibited any investigations by the UN or independent human rights organizations into the attack.<sup>68</sup> In fact, military officials allegedly involved in planning the attack have been promoted within the government. For example, both Lieutenant General Soe Win and Regional Commander Major General Soe Naing allegedly were involved in the planning and execution of the attack, yet both have been promoted.<sup>69</sup>

In August 2003, General Khin Nyunt, the head of military intelligence, succeeded Than Shwe as prime minister, but Than Shwe remained the head of the SPDC. When Khin Nyunt became prime

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<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See Myanmar: History, *supra* note 1.

<sup>57</sup> See Background Note, *supra* note 1, see also Time for Change, *supra* note 17, at 9.

<sup>58</sup> See Time for Change, *supra* note 17, at 9.

<sup>59</sup> See *id.* at 7.

<sup>60</sup> See Human Rights Watch: World Report 2005: Burma (hereinafter Human Rights Watch Report). See also Simon Montlake, Burma's 'Black Friday', BBC NEWS, Jun. 16, 2003, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/2993196.stm> (reporting that exiled opposition groups claim that 70 people died in the violence on May 30, 2003).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See Time for Change, *supra* note 17, at 7.

<sup>64</sup> See Background Note, *supra* note 1; Myanmar: History, *supra* note 1.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*; see also Myanmar Tells Thailand Suu Kyi's Custody "Temporary", ASIAN POLITICAL NEWS, Jun. 9, 2003 (reporting that Thailand received a letter from Myanmar Foreign Minister Win Aung that the government's measures were "merely temporary with reasons of security and safety").

<sup>68</sup> See Human Rights Watch Report, *supra* note 60; see also Statement by Mr. Paulo Pinheiro, Special Rapporteur on the Situation of Human Rights in Myanmar, 58th Session of the UN General Assembly, Third committee, Item 117(c), Nov. 12, 2003, available at <http://www.ibiblio.org/obl/docs/GA2003-SRM-oral.htm>.

<sup>69</sup> See William Barnes, New Burmese Leader 'Planned Attack on Suu Kyi', FINANCIAL TIMES, Oct. 25, 2004, p. 2 (hereinafter Barnes Article). Richard Boucher, US State Department spokesman, stated that Lt. Gen. Soe Win was "directly involved in the decision to carry out the brutal attack." *Id.* See also Burma: Country Reports on Human Rights Practices 2004, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, Feb. 28, 2005 (hereinafter Dept. of State Report).

minister, the SPDC announced a “road map” to democracy, which included reconvening the national convention to draft a new constitution, holding a national referendum to approve the new constitution, holding parliamentary elections, and forming a new government.<sup>70</sup> The SPDC developed the road map without consulting any opposition political or ethnic groups, who had called for dialogue about the future direction of the country.<sup>71</sup> In May 2004, the SPDC reconvened the national convention.<sup>72</sup> The NLD, along with other democratic opposition groups, boycotted the constitutional convention because of the continued detention of Aung San Suu Kyi.<sup>73</sup> Most of the 1,000 delegates who attended the national convention were hand-picked and approved by the SPDC.<sup>74</sup> The delegates were not permitted to question the SPDC’s objectives, challenge the military, or make any “anti-national” comments.<sup>75</sup> Any delegate who criticized the convention could face a prison term of up to 20 years.<sup>76</sup> To date, the government still has not been able to put forward a new constitution; nor has it provided a timetable for completion of the road map. It is widely presumed that the SPDC is intending to force a constitution onto the convention delegates which will cement the power of the military in the future.<sup>77</sup> The UN Special Rapporteur on Human Rights in Myanmar, Paulo Pinheiro, has called the convention a sham, stating, “[t]his will not have worked in Brazil, in Uruguay, in Argentina, in Portugal, in Spain, in the Philippines, in the Indonesia. This political transition will not work. Will not work on the moon, it will not work on Mars.”<sup>78</sup>

Internal struggles within the government itself also persist. On October 19, 2004, the government ousted Khin Nyunt, who had served as prime minister for only a little over a year.<sup>79</sup> Khin Nyunt was charged with corruption and is reported to be under house arrest.<sup>80</sup> In his place, the SPDC appointed Lieutenant General Soe Win.<sup>81</sup> Soe Win has close links to Than Shwe and directed the May 30, 2003, attack on Aung San Suu Kyi and her convoy.<sup>82</sup> It is widely thought that the appointment of Soe Win will “diminish hopes for reform.”<sup>83</sup> Soe Win has stated publicly that “the SPDC not only will not talk to the NLD but also would never hand over power to the NLD.”<sup>84</sup> Commentators claim that the appointment of Soe Win “will have a negative effect on national reconciliation.”<sup>85</sup> Indeed, the government has extended Aung San Suu Kyi’s detention until at least the end of November 2005 and tightened the restrictions of her house arrest.<sup>86</sup> Moreover, the government has continued its repression of opposition groups. For example, during 2004 the government arrested at least 85 democracy supporters, primarily members of

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<sup>70</sup> See Myanmar: History, *supra* note 1; Human Rights Watch Report, *supra* note 60; and Economist Country Profile, *supra* note 44, at 7.

<sup>71</sup> See Economist Country Profile, *supra* note 44.

<sup>72</sup> See Myanmar: History, *supra* note 1; Human Rights Watch Report, *supra* note 60; and Economist Country Profile, *supra* note 44, at 7.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See Richard Ehrlich, *Burma Military Restricts Authors of Constitution*, WASHINGTON TIMES, May 21, 2004.

<sup>78</sup> Kylie Morris, *Burma Criticized by UN Envoy*, BBC NEWS, Jun. 1, 2004, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/3765405.stm>.

<sup>79</sup> See Background Note, *supra* note 1; see also Kate McGeown, *Khin Nyunt’s Fall from Grace*, BBC NEWS, Oct. 19, 2004, available at [news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/3756052.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/3756052.stm). The ouster of Khin Nyunt has been attributed to various causes. First, Khin Nyunt was the chief of military intelligence, and there had been numerous conflicts between intelligence and the army for some time. Second, Than Shwe may have wanted to secure his own future by removing Khin Nyunt. Third, Burmese military intelligence owns several companies, and the ouster could be attributable to business-related conflicts.

<sup>80</sup> See Human Rights Annual Report 2005, United Kingdom Foreign and Commonwealth Office, Section 2.3 (hereinafter UK Report).

<sup>81</sup> See Myanmar: History, *supra* note 1.

<sup>82</sup> See *Hardline Generals*, *supra* note 42; see also Barnes Article, *supra* note 69.

<sup>83</sup> See Human Rights Watch Report, *supra* note 60.

<sup>84</sup> See *id.*

<sup>85</sup> See UK Report, *supra* note 80.

<sup>86</sup> See *id.*

the NLD.<sup>87</sup> In February 2005, the government arrested 10 Shan democratic leaders, including Khun Tun Oo.<sup>88</sup> Amnesty International reports that over 1,100 political prisoners remain in prison in Burma today, among them elected members of Parliament.<sup>89</sup>

## **7. Current Situation**

Today Burma remains under the control of the SPDC, the ruling military junta, headed by Than Shwe.<sup>90</sup> Active-duty or retired military officers occupy 33 of 38 ministerial-level positions in the government, including those of the prime minister and the mayors of Rangoon and Mandalay.<sup>91</sup> Corruption throughout all levels of government is widespread, particularly thanks to the SPDC's "complete lack of accountability and transparency."<sup>92</sup> The SPDC has yet to permit the 485-member legislative assembly to convene. The national convention that was formed to draft a new constitution has managed to meet sporadically, although without the participation of the NLD and other pro-democracy ethnic groups.<sup>93</sup> It last convened on February 17, 2005, and adjourned on March 31, 2005, again without completing the constitution.<sup>94</sup> The central government in Rangoon exercises administrative control through a series of executive bodies in Burma's 14 states and divisions.<sup>95</sup> The judiciary is not independent and "there is no guarantee of a fair public trial."<sup>96</sup> Pro-democracy campaigners and members of ethnic nationality groups often are denied proper legal representation. Their trials are held in secret.<sup>97</sup> The primary political parties are the pro-government National Unity Party (NUP), the Shan Nationalities League for Democracy (SNLD), and the NLD led by Aung San Suu Kyi.<sup>98</sup> Additionally, the United Nationalities League for Democracy and United Nationalities Alliance are coalitions of smaller, ethnic political parties which won seats in the 1990 election and work closely with the NLD.<sup>99</sup> In 1998, as the government continued refusing to allow the 1990 parliament to convene, the NLD and allied political

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<sup>87</sup> See Dept. of State Report, *supra* note 69. The U.S. Department of State report documents numerous specific incidents and reports of detentions and arrests that took place in 2004.

<sup>88</sup> See UK Report, *supra* note 80 at 37.

<sup>89</sup> See *Freedom for 200 But Many More Still in Prison*, Amnesty International, available at: <http://news.amnesty.org/index/ENGASA160222005>, last visited Sept. 1, 2005; see also Human Rights Watch Report, *supra* note 60. The prison terms of some prisoners have already expired, yet they remain incarcerated. The Penal Code allows the government to extend a prisoner's sentence even after the prisoner has completed the original sentence, and the authorities make regular use of this penal code provision. See Dept. of State Report, *supra* note 69. The government claims that it has released 19,906 prisoners since Nov. 18, 2004, but estimates show that only 0.5 percent of those released were political prisoners. Most prisoners released were petty criminals whose sentences had only two or three more years to run. See UK Report, *supra* note 80, at 37.

<sup>90</sup> See *Hardline Generals*, *supra* note 42. Than Shwe is rarely seen in public and is said to be similar to the reclusive former dictator Ne Win, who died under house arrest in December 2002. See *Time for Change*, *supra* note 17, at 9.

<sup>91</sup> See Dept. of State Report, *supra* note 69.

<sup>92</sup> See Economist Country Profile, *supra* note 44, at 10.

<sup>93</sup> See *id.* (noting that the government prohibited free debate on the drafting of the constitution and threatened 5-20 years in prison for any criticism of the process); see also Background Note, *supra* note 1.

<sup>94</sup> See UK Report, *supra* note 80.

<sup>95</sup> See Background Note, *supra* note 1.

<sup>96</sup> See *CIA: The World Factbook: Burma*, available at [www.cia.gov/cia/publications/factbook/print/bm.html](http://www.cia.gov/cia/publications/factbook/print/bm.html) (hereinafter *CIA World Factbook*). See also Dept. of State Report, *supra* note 69. The SPDC appoints Justices to the Supreme Court, who in turn, appoint lower court judges with the approval of the SPDC. The courts adjudicate cases under decrees promulgated by the SPDC.

<sup>97</sup> See Economist Country Profile, *supra* note 44, at 10.

<sup>98</sup> See *id.*

<sup>99</sup> See, e.g., Naw Seng, *Ethnic Parties Boycott National Convention*, *IRRAWADDY MAGAZINE*, May 14, 2004 (discussing UNA's decision to boycott the national convention shortly after NLD's decision to boycott the convention), available at <http://www.irrawaddy.org/aviewer.asp?a=3901&z=24>; *NLD and UNLD Vow to Continue Cooperation for Democracy*, *Democratic Voice of Burma*, Feb. 25, 2004, available at <http://english.dvb.no/news.php?id=333> (discussing a meeting between the NLD, the UNLD, and various other ethnic nationality groups regarding cooperation between the groups to boycott the national convention and continue support for democracy).

parties also formed a 10-member committee to represent the parliament, the Committee Representing People's Parliament (CRPP).<sup>100</sup>

As the largest democratic opposition group to the military junta, the NLD has called for dialogue with the current government and ethnic nationalities and has shown a willingness to share power with the military. However, the military junta continues to oppress NLD members and refuses to release Aung San Suu Kyi and NLD Vice Chairman U Tin Oo from house arrest. The NLD desires a civilian-run democratic government in Burma. Aung San Suu Kyi has stated that she has not ruled out a transitional government in which the military shares political power with civilians.<sup>101</sup> Moreover, she has stressed that she would like to reach an agreement with the military that would allow the generals to withdraw from power without fear of retribution.<sup>102</sup>

On December 2, 2004, the NLD sent a letter to the SPDC chairman calling for national reconciliation and dialogue between the SPDC and the NLD. In a subsequent letter to the SPDC, sent on December 23, 2004, the NLD stressed forgiveness and suggested that the first phase of the talks with the SPDC be "concentrated on ways to condone each other" because "the solution to national problems facing the country today depends on forgiveness relating to some issues."<sup>103</sup> In 2000, Aung San Suu Kyi and the NLD had begun secret meetings with the SPDC facilitated by the UN Secretary-General's Special Envoy for Myanmar, Tan Sri Razali Ismail.<sup>104</sup> These meetings brought fresh hope of reform, but those hopes were dashed by the violent attack on Aung San Suu Kyi and her convoy in May 2003 and both Aung San Suu Kyi and U Tin Oo's subsequent detention.<sup>105</sup> Aung San Suu Kyi continues to be held in "virtually solitary confinement" and does not have any access to telephones, newspapers, the Internet, or any other correspondence.<sup>106</sup> The current military regime, led by Soe Win as the new prime minister and Than Shwe as the ultimate power broker, has shown no willingness to renew any political dialogue with the NLD.<sup>107</sup>

## ***B. Economic Development***

### **1. Economic Mismanagement by the Burmese Government**

Burma is a country rich in natural resources, but serious economic mismanagement has made it into one of the most impoverished countries in the world today. One American think tank has even called Burma's economy "the most distorted in the world save for North Korea's."<sup>108</sup> After World War II, Burma enjoyed significant economic prosperity; in the mid-1950s, for instance, it was the world's leading rice exporter.<sup>109</sup> However, when General Ne Win came into power in 1962, his Burmese Way to

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<sup>100</sup> See *Committee Constituted to Act for and on behalf of the 1990 Multi-Party General Elections People's Parliament Statement No. 1*, Sept. 17 1998, available at <http://www.ibiblio.org/obl/docs/crpp1998.01.htm>.

<sup>101</sup> See Philip Shenon, *Democrat Won't Rule Out Sharing Power in Myanmar*, THE NEW YORK TIMES, Jul. 14, 1995.

<sup>102</sup> See *id.*

<sup>103</sup> Letter to SPDC on Dec. 23, 2004, available at [ww.ncgub.net/NLD\\_Stateemtns/NLD%20Statement%2027Dec2004E.htm](http://ww.ncgub.net/NLD_Stateemtns/NLD%20Statement%2027Dec2004E.htm).

<sup>104</sup> See *Time for Change*, *supra* note 17, at 9.

<sup>105</sup> See *supra* notes 59-67 and accompanying text.

<sup>106</sup> See *The Mess That the Army Has Made of Myanmar*, THE ECONOMIST, Jul. 21, 2005 (hereinafter *The Mess in Myanmar*).

<sup>107</sup> See *Time for Change*, *supra* note 17, at 9; see also Human Rights Watch Report, *supra* note 60.

<sup>108</sup> See *The Mess in Myanmar*, *supra* note 106 (quoting The Heritage Foundation). See also Economist Country Profile, *supra* note 44, at 22 (noting that Burma is "among the world's lowest-income countries by any measure").

<sup>109</sup> See Tony Broadmoor, *Burma's Economic Blues*, IRRAWADDY MAGAZINE, Jul.-Aug. 2002, available at [www.irrawaddy.org/database/2002/vol10.6/article1.html](http://www.irrawaddy.org/database/2002/vol10.6/article1.html) (hereinafter *Economic Blues*). Burma set rice export records for any single country for two years in a row in 1954 and 1955. *Id.*

Socialism put in place created isolationist economic policies that halted—and then stunted—Burma's economy.<sup>110</sup>

The country's economic troubles culminated in 1987-1988 with severe rice shortages and the devaluation of the currency, provoking demonstrations and riots that resulted in the bloodshed of August 8, 1988.<sup>111</sup> SLORC was formed in 1989 supposedly to dismantle the socialist economy and create an open-market system.<sup>112</sup> However, the SLORC refused to carry out significant economic reforms, and when the SPDC was subsequently formed, it also stymied economic change. The SPDC has not responded to calls by the International Monetary Fund (IMF), the World Bank, and the Asian Development Bank to initiate reforms, causing one report to note that the government "seems to lack both the capacity and the will to tackle the country's severe macroeconomic imbalances."<sup>113</sup> In February 2003, Burma experienced a banking crisis triggered when the government closed a dozen private deposit companies, causing a run on deposits at the larger banks. As a result, all banks imposed withdrawal limits, required customers to promptly repay outstanding loans, and suspended use of ATM machines.<sup>114</sup> Some banks also are linked to the country's drug cartels and have been involved extensively in money laundering.<sup>115</sup> Because Burma has refused to take action against money laundering, the inter-governmental Financial Action Task Force, whose mission is to counter the use of financial systems by criminals, has labeled Burma one of only three countries in the world which are "non-cooperative" with its efforts.<sup>116</sup> Accurate economic data about Burma is difficult to obtain because the government stopped reporting economic data in 1998.<sup>117</sup> Moreover, Burma has a large informal and extralegal economy, which includes including illegal logging, smuggling of goods, and opium trafficking. These illegal activities are not reflected in these old statistics.<sup>118</sup>

## **2. Economic and Social Indicators**

The population of Burma is estimated to be approximately 52 million, with an estimated population growth rate of 0.42 percent.<sup>119</sup> It is estimated that 75 percent of the population lives below the

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<sup>110</sup> See *id.* "The Burmese Way to Socialism," published on April 28, 1962, sets forth Ne Win's plans for the socialist economy. The document asserts that the "fundamental concept of socialist economy is the participation of all for the general well-being in works of common ownership, and planning towards sufficiency and contentment of all, sharing the benefits derived therefrom." The document also calls for the nationalization of all means of production and all external trade, claiming that "State ownership forms the main basis of socialist economy."

<sup>111</sup> See *Waiting for Democracy*, BBC NEWS, available at [http://news.bbc.co.uk/1/hi/special\\_report/1998/08/98/burma/145416.stm](http://news.bbc.co.uk/1/hi/special_report/1998/08/98/burma/145416.stm), last visited Sept. 1, 2005.

<sup>112</sup> See Dennis Report, *supra* note 16.

<sup>113</sup> See Economist Country Profile, *supra* note 44, at 23.

<sup>114</sup> See Time for Change, *supra* note 17, at 11-12. See also Economist Country Profile, *supra* note 44, at 35. In February 2003, rumors spread that several large private-sector banks had made heavy loans or incurred heavy losses on outstanding loans and that many unregulated non-bank financial institutions engaged in pyramid-lending schemes, which led to a loss of confidence in the financial system. The SPDC responded slowly to these problems and did not prevent the crisis which followed. *Id.*

<sup>115</sup> See Economist Country Profile, *supra* note 44, at 35.

<sup>116</sup> See *Financial Action Task Force Annual Report 2004-2005*, Financial Action Task Force, Jun. 10, 2005, available at <http://www.fatf-gafi.org/dataoecd/41/25/34988062.pdf>. The other two non-cooperative countries and territories are Nauru and Nigeria. The FATF is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

<sup>117</sup> See Economic Blues, *supra* note 109.

<sup>118</sup> See Economist Country Profile, *supra* note 44, at 21.

<sup>119</sup> The U.S. State Department has published the 2003 population estimate to be 52.17 million, noting that no official census has been taken since 1983. See Background Note, *supra* note 1. Population estimates vary. See, e.g., CIA World Factbook, *supra* note 96. The World Factbook notes that the 2005 population estimate of 43 million people take into account the effects of excess mortality due to AIDS, resulting in lower life expectancy, higher infant mortality and death rates, and lower population growth rates and changes in the population distribution by age and sex than would otherwise be expected. The World Bank's 2004 World Development Indicators showed the population of Burma to be 49 million in 2002. *2004 World Development Indicators*, World Bank, at 15.

poverty line.<sup>120</sup> Burma has an estimated GDP of \$74.3 billion and GDP per capita of \$1,700.<sup>121</sup> Estimates from 2003 show that Burma had the lowest per capita GDP in a region that includes Bangladesh, Laos, Thailand, Malaysia, and Vietnam.<sup>122</sup> Agriculture plays a dominant role in Burma's economy, with 54 percent of GDP derived from agriculture, livestock, fisheries and forestry.<sup>123</sup> Manufacturing constitutes 9 percent and services constitute 8 percent of GDP.<sup>124</sup> The illegal drug trade also plays a strong role in the economy. Burma is the world's second largest producer of illicit opium and Southeast Asia's largest producer of methamphetamines.<sup>125</sup> Drug profits heavily influence the local economy.<sup>126</sup>

The official exchange rate set by the government in 2004 was approximately 6 kyat to the US dollar; however, unofficial exchange rates in 2004–2005 ranged from 815 kyat/US dollar to 1,150 kyat/US dollar.<sup>127</sup> Inflation rates are estimated to be anywhere from 17.2 percent to 30–50 percent per year.<sup>128</sup> The inflation rate for consumer prices was estimated to be at 49.7 percent for 2003, giving Burma the second highest inflation rate out of 176 countries.<sup>129</sup>

United Nations Development Program (UNDP) indicators ranked Burma 148 out of 176 countries for combined primary, secondary, and tertiary gross educational enrollment ratios and 157 out of 175 countries for GDP per capita.<sup>130</sup> Burma has a high infant mortality rate—well more than double the average in East Asia and the Pacific.<sup>131</sup>

### **3. The Military's Pervasive Role in the Economy**

The military dominates nearly all aspects of the economy. It controls two major companies that dominate key economic sectors, the Union of Myanmar Economic Holdings (UMEH) and the Myanmar Economic Corporation (MEC).<sup>132</sup> The Union Solidarity Development Association, an SPDC-organized and controlled mass association, is also involved extensively in business.<sup>133</sup> An annual report leaked by UMEH in 1995–1996 stated that the two main objectives of UMEH are “to support military personnel and

<sup>120</sup> See *The Mess in Myanmar*, *supra* note 106. See also Economist Country Profile, *supra* note 44, at 23 (noting that high rates of child malnutrition and other indicators suggest that the real incidence of poverty is likely much higher than reported statistics).

<sup>121</sup> See CIA World Factbook, *supra* note 96.

<sup>122</sup> See *How Burma Adds Up: A Statistical Comparison of Burma and Its Neighbors*, HIMAL South Asian, Apr. 2003 (hereinafter HIMAL Report). The report shows the following per capita GDP for each country in US dollars for 2003: Malaysia – \$9,000; Thailand – \$6,600; Vietnam – \$2,100; Bangladesh – \$1,750; Laos – \$1,630; and Burma – \$1,500.

<sup>123</sup> See Background Note, *supra* note 1 (providing 2004 estimates). Other data shows that agriculture (including forestry and fishing) accounted for 57.2 percent of GDP in fiscal year 2001/02 (April–March) and employed close to 63 percent of the workforce in 1997/98. See Economist Country Profile, *supra* note 44, at 21.

<sup>124</sup> See *id.*

<sup>125</sup> See *Drug Intelligence Brief: Methamphetamine: The Current Threat in East Asia and the Pacific Rim*, U.S. Drug Enforcement Administration, Sept. 2003, available at <http://www.usdoj.gov/dea/pubs/intel/03052>

<sup>126</sup> See CIA World Factbook, *supra* note 96.

<sup>127</sup> See CIA World Factbook, *supra* note 96; *Exchange Rate as of Aug. 25, 2005*, IRRAWADDY MAGAZINE, available at <http://www.irrawaddy.org>.

<sup>128</sup> See *id.*; see also *Time for Change*, *supra* note 17, at 11.

<sup>129</sup> See Nationmaster: Map & Graph: Economy: Inflation Rate–Consumer Prices, available at [http://www.nationmaster.com/graph-T/eco\\_inf\\_rat\\_con\\_pri](http://www.nationmaster.com/graph-T/eco_inf_rat_con_pri).

<sup>130</sup> See *Human Development Report 2004: Country Fact Sheets: Myanmar*, available at [http://hdr.undp.org/statistics/data/country\\_fact\\_sheets/cty\\_fs\\_MMR.html](http://hdr.undp.org/statistics/data/country_fact_sheets/cty_fs_MMR.html); see also UNDP Human Development Index 2002, available at [http://hdr.undp.org/statistics/data/indic/indic\\_8\\_1\\_1.html](http://hdr.undp.org/statistics/data/indic/indic_8_1_1.html). The UNDP Human Development Index is based on three components of human development: (1) longevity, measured by life expectancy; (2) knowledge, measured by combination of adult literacy and mean years of schooling; and (3) standard of living, measured by purchasing power. *Id.*

<sup>131</sup> The infant mortality rate for 2002 was 78 per 1,000 live births, compared to an average of 33 in East Asia and the Pacific. See Economist Country Profile, *supra* note 44, at 15.

<sup>132</sup> See *The EU and Burma: The Case for Targeted Sanctions*, The Burma Campaign UK, Mar. 2004, available at [www.burmacampaign.org.uk/reports/targeted\\_sanctions.htm](http://www.burmacampaign.org.uk/reports/targeted_sanctions.htm) (hereinafter EU and Burma).

<sup>133</sup> See Economist Country Profile, *supra* note 44, at 22.

their families” and “to try and become the main logistics and support organization for the military.”<sup>134</sup> Only members of the military establishment may be shareholders in UMEH.<sup>135</sup> MEC’s purpose is to shift defense expenses from the public to the private sector, and MEC is authorized to conduct business in almost any field of commerce.<sup>136</sup>

The Myanmar Investment Commission, which includes many members of the military cabinet and is controlled by the SPDC, approves all foreign investment in Burma.<sup>137</sup> In this fashion, the military regime can direct resources toward the military companies that dominate the economy, such as UMEH.<sup>138</sup> Estimates of the government’s military expenditure range from 29 percent to 50 percent of the total government budget.<sup>139</sup> Since 1988, the size of the military has doubled, from 200,000 men to an estimated 400,000 now.<sup>140</sup> The regime’s goal is to eventually have a 500,000-man military.<sup>141</sup> Burma already has a larger military than many of its neighbors, including Bangladesh, Laos, Thailand, and Malaysia, yet does not have any external enemies.<sup>142</sup>

Support for the military by the general population is low. Even in areas most heavily populated by members of the military and their families, voters chose the NLD in the 1990 election. For example, in the Rangoon division, the military-government-backed National Unity Party did not even win a single parliamentary seat. In ethnic areas, the military’s success rate was also miniscule; in Shan state, of 62 total seats, the military only won one.<sup>143</sup>

#### **4. Health and Education**

By contrast to the 30-50 percent spent on the armed forces, the government allocates only 3 percent of its budget to health and 8 percent to education.<sup>144</sup> In fact, from 1990-1999, Burma ranked fifth from the bottom in education expenditures as compared to 128 other countries.<sup>145</sup> Other low-income Asian economies spend around 3 percent of GDP on education, but Burma spends only 0.3 percent of GDP on education, according to 1999/2000 IMF estimates.<sup>146</sup>

In terms of health care delivery, the World Health Organization ranked Burma at the bottom worldwide: out of 191 countries, Burma was 190<sup>th</sup>. Only Sierra Leone ranked lower.<sup>147</sup> Even basic supplies such as pain killers and bandages are difficult to obtain in the country.<sup>148</sup> UNICEF reported that

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<sup>134</sup> See EU and Burma, *supra* note 132.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See The Mess in Myanmar, *supra* note 106; UK Report, *supra* note 80.

<sup>140</sup> See EU and Burma, *supra* note 132.

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* (noting that Burma “has one of the largest armies in Asia, and yet has not external enemies”); see also HIMAL Report, *supra* note 122. The HIMAL Report showed the number of armed forces in 2000 in Burma and its neighboring countries as follows: Vietnam (484,000), Burma (344,000), Thailand (300,000), Bangladesh (137,000), Malaysia (96,000), and Laos (29,000).

<sup>143</sup> See *World Facts Index: Burma*, available at <http://worldfacts.us/Burma.htm>.

<sup>144</sup> See The Mess in Myanmar, *supra* note 106. Another report shows that public health and public education expenditures as percentage of GDP have decreased over the years. In 1990, public health expenditure was 1.1 percent of GDP, while in 2001, it was only 0.4 percent of GDP. In 1990, education expenditure was 2.4 percent of GDP, while in 2001, it was only 1.3 percent of GDP. See Social Watch: Extended Data of Myanmar-Burma, available at [www.socwatch.org.uy/en/fichasPais/ampliado\\_137.html](http://www.socwatch.org.uy/en/fichasPais/ampliado_137.html) (hereinafter Social Watch).

<sup>145</sup> See Government Education Expenditure, 1990-1999, available at [http://www.nationmaster.com/graph-T/edu\\_edu\\_spe](http://www.nationmaster.com/graph-T/edu_edu_spe).

<sup>146</sup> See Economist Country Profile, *supra* note 44, at 17. IMF estimates showed that education spending dropped from 1 percent of GDP in the early 1990s to 0.3 percent in 1999/2000. UNDP estimates, however, showed that education spending for 1999/2000 was slightly higher, at 1.3 percent of GDP. *Id.*

<sup>147</sup> See EU and Burma, *supra* note 132; see also Time for Change, *supra* note 17.

<sup>148</sup> See The Mess in Myanmar, *supra* note 106.

36 percent of Burmese children under five years old are moderately to severely underweight.<sup>149</sup> HIV/AIDS continues to be a major problem and will be discussed in greater detail in Section II.A.5.

The life expectancy in Burma is low compared to that in neighboring countries.<sup>150</sup> Once one of the most literate countries in the region, Burma now lags behind its neighbors in literacy rates as well, although current reports of literacy rates vary greatly.<sup>151</sup> No literacy surveys have been conducted in Burma for more than two decades.<sup>152</sup> One-third of children who go to school do not complete five years of elementary school.<sup>153</sup> UNICEF estimates that 55 percent of children continue to middle school and 25 percent enroll in high school.<sup>154</sup> Children are not able to finish school because their parents cannot afford the increasing fees or because falling family incomes require the children to work.<sup>155</sup>

## **5. Lack of Infrastructure**

Burma lacks economic infrastructure. Electricity generation is insufficient for even the most basic consumption.<sup>156</sup> The country also lacks roads. Only about 0.005 kilometers of road exist per square kilometer. In comparison, Thailand has approximately 0.12 kilometers of road per square kilometer.<sup>157</sup> Railways are similarly in poor condition, so that inland waterways remain Burma's primary means of long-distance transport.<sup>158</sup> While Thailand has an estimated 65 paved airports, Burma has only nine.<sup>159</sup> Modern communications also have not advanced in Burma. In fact, the telephone system "barely meets minimum requirements for local and intercity service for business and government."<sup>160</sup> Burma has 357,300 telephone land lines in use and 66,500 mobile cellular phones in use, while Thailand has about 6.6 million telephone land lines and 26.5 million mobile cellular phones.<sup>161</sup> Burma only has one Internet service provider, and Internet access is severely restricted.<sup>162</sup> The International Telecommunications Union reported that Burma has the lowest number of Internet users per capita in all of Asia.<sup>163</sup>

## **6. Foreign Investment and Trade**

After the suppression of the demonstrators in 1988 and the government's refusal to recognize the results of the 1990 election, much overseas development assistance in Burma ceased. The military controls most of the foreign direct investment because investment is directed through companies owned

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<sup>149</sup> See EU and Burma, *supra* note 132; see also Social Watch, *supra* note 144.

<sup>150</sup> See HIMAL Report, *supra* note 122. The report shows the following life expectancies, in years, for Burma and its neighboring countries: Malaysia (71), Vietnam (70), Thailand (69), Bangladesh (61), Burma (55), and Laos (54).

<sup>151</sup> See *id.* (reporting that the literacy rate for those 15 years and older was 30 percent in 2002, compared to 94 percent in Vietnam, 94 percent in Thailand, 84 percent in Malaysia, 57 percent in Laos and 56 percent in Bangladesh). However, the CIA World Factbook reports that the literacy rate for those 15 years and older is 85 percent. CIA World Factbook, *supra* note 96.

<sup>152</sup> See Time for Change, *supra* note 17, at 13.

<sup>153</sup> *Id.*

<sup>154</sup> See Economist Country Profile, *supra* note 44, at 17.

<sup>155</sup> See *id.*

<sup>156</sup> See HIMAL Report, *supra* note 122 (reporting Burma's electricity generation to be 4.8 billion kWh, compared to 94.3 billion kWh in Thailand, 63.1 billion kWh in Malaysia and 13.5 billion kWh in Bangladesh). See also Economist Country Profile, *supra* note 44, at 20-21. A 1997 survey showed that only 37 percent of households had access to electricity for lighting, with 71.6 percent in urban areas and 17.7 per cent in rural areas. The power supply is not adequate, and the Ministry of Electric Power estimates a 220-mw shortfall. *Id.*

<sup>157</sup> See *id.*

<sup>158</sup> See Economist Country Profile, *supra* note 44, at 19. Two and a half times more freight is transported via water than via road. *Id.*

<sup>159</sup> See CIA World Factbook, *supra* note 96; see also CIA World Factbook: Thailand, Jul. 28, 2005, available at <http://www.cia.gov/cia/publications/factbook/geos/th.html>.

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

<sup>163</sup> See Economist Country Profile, *supra* note 44, at 20.

and operated by the Ministry of Defense, such as UMEH.<sup>164</sup> In addition, the government prohibits full foreign ownership of companies operating in Burma, so most foreign investment is carried out through joint ventures with the military regime.<sup>165</sup> By 1999, UMEH had established almost 50 joint ventures with foreign firms.<sup>166</sup> Official figures claim that over \$10 billion in foreign investment has been approved since 1988, but by 2000 less than one-fifth of that amount had actually reached Burma.<sup>167</sup>

Countrywatch ranks Burma 191 out of 192 countries both in its total trade (i.e., total of exports plus imports) and its trade ratio (i.e., ratio of total trade to GDP)—the only country ranking worse is the tiny Pacific nation of Nauru.<sup>168</sup> The SPDC has placed stringent restrictions on trade. For example, before they can import selected non-essential items, importers must purchase goods from a list of priority items, and the export of certain key commodities was banned in 1998.<sup>169</sup> In March 2002, the government revoked licenses of all foreign trading firms, affecting around 100 foreign trading companies.<sup>170</sup>

### ***C. Demographics of Population***

Burma is a diverse country with numerous ethnic nationalities. The majority ethnic group—an estimated 68 percent of the population—is Burman.<sup>171</sup> Other major ethnic nationalities are the Shan, Karen, Rakhine (or Arakan), Karenni, Chin, Kachin, and Mon, as well as Sino and Indo-Burmese.<sup>172</sup> The country is divided geographically into seven primarily Burman divisions and seven ethnic states, with the ethnic states located in border regions.<sup>173</sup> Estimates of ethnic group populations are contentious, and the available statistics may underestimate minority figures.<sup>174</sup>

Burmese is the national language, but most ethnic groups have their own language as well.<sup>175</sup> Buddhism is the dominant religion.<sup>176</sup> Many Karen, Karenni, and Kachin are Christian, and Muslims are concentrated in Rakhine state.<sup>177</sup> There are also modest numbers practicing other religions, such as animism.<sup>178</sup>

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<sup>164</sup> See *Burma: Country in Crisis: Foreign Investment*, Open Society Institute Burma Project, 2001, available at <http://burmaproject.org/CRISIS/index.html> (hereinafter *Country in Crisis*).

<sup>165</sup> See *id.*

<sup>166</sup> See EU and Burma, *supra* note 132.

<sup>167</sup> See *Country in Crisis*, *supra* note 164.

<sup>168</sup> See Countrywatch: Trade Rankings, available at [http://aol.countrywatch.com/aol\\_topic.asp?TYPE=GRANK&TBL=TRADEOVER&VCOUNTRY=28](http://aol.countrywatch.com/aol_topic.asp?TYPE=GRANK&TBL=TRADEOVER&VCOUNTRY=28).

<sup>169</sup> See Economist Country Profile, *supra* note 44, at 38.

<sup>170</sup> See *id.* at 24 & 38.

<sup>171</sup> See CIA World Factbook, *supra* note 96.

<sup>172</sup> See *id.* Note, however, that the government has not taken an official census of the ethnic minorities since 1931. The 1931 census results were as follows: 65 percent Burman, 9 percent Karen, 7 percent Shan, 2 percent Chin, 2 percent Mon, 1 percent Kachin, and 1 percent Wa. See Economist Country Profile, *supra* note 44, at 17.

<sup>173</sup> See CIA World Factbook, *supra* note 96. The seven states are Chin state, Kachin state, Kayin state, Kayah state, Mon state, Rakhine state, and Shan state.

<sup>174</sup> See Economist Country Profile, *supra* note 44; see also Guy Horton, *Dying Alive: A Legal Assessment of Human Rights Violations in Burma*, Apr. 2005 (hereinafter *Guy Horton Report*) (finding that “no reliable figures have been collected or released since independence and those that are published appear to deliberately play down ethnic minority numbers” quoting *Burma, Insurgency and the Politics of Ethnicity*, Ch. 2, p. 30). However, the *Guy Horton Report* notes that the estimates of the population in Karenni state is an exception to the Burmese government’s usual downplay of ethnic minority populations. UNICEF found that the population in Karenni state in 1998 was 207,357, while the Burmese Ministry of Immigration and Population stated that 246,000 people lived in the state. The *Guy Horton Report* suggests the Government of Burma did not reduce the numbers for this state because the government wanted to “conceal the true destruction of the Karenni people.” *Id.* at 87.

<sup>175</sup> See CIA World Factbook, *supra* note 96.

<sup>176</sup> See *id.*

<sup>177</sup> See Economist Country Profile, *supra* note 44.

<sup>178</sup> See CIA World Factbook, *supra* note 96.

Based on 2005 estimates, only 5 percent of the population is 65 years and over, while 67.8 percent is 15-64 years and 27.2 percent is under 15 years.<sup>179</sup>

## **1. Discrimination and Abuse against Ethnic Minority Groups**

The SPDC has purposefully made ethnic minorities the targets of violence and human rights abuses. Well-documented abuses include food and land requisitions, killings, torture, beatings, forced labor, forced relocations, and rapes by SPDC military forces.<sup>180</sup> Armed ethnic groups also have committed human rights abuses, but not to the same degree as the SPDC.<sup>181</sup> Since 1996, the SPDC has forcibly relocated numerous members of minority ethnic groups, destroyed over 2,500 villages, and systematically displaced more than 600,000 citizens.<sup>182</sup> These forced relocations are widespread in the Shan, Kayah, and Karen states and often are accompanied by systematic rape, executions, and demands for forced labor.<sup>183</sup> The government's relocation and abuse of ethnic minority groups is based on its Four Cuts strategy, which aims to counter insurgents by cutting off supplies of food, funds, intelligence, and recruits that could flow between the insurgents, their families, and local villages.<sup>184</sup>

## **2. Internally Displaced Persons and Refugees**<sup>185</sup>

As a result of these substantial abuses against ethnic minorities, Burma has a large population of internally displaced persons, and numerous refugees have fled to neighboring countries. Burma has an estimated 630,000 internally displaced persons.<sup>186</sup> The World Refugee Survey 2005 states that Burma has produced 691,800 refugees.<sup>187</sup> This estimate does not include additional millions who have fled Burma but are not officially documented as refugees.<sup>188</sup> Economic mismanagement coupled with ethnic persecution has resulted in one of the largest migration flows in Southeast Asia.<sup>189</sup>

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<sup>179</sup> See *id.* These statistics vary slightly between different sources. One report notes that 33 percent of the population is in the 0-14 age group, while 8 percent are over 60 years of age, which is "typical of a low-income country." See Economist Country Profile, *supra* note 44.

<sup>180</sup> See Dept. of State Report, *supra* note 69; 2005 Annual Report Entry: Myanmar (Burma), Amnesty International, available at [http://www.amnestyusa.org/countries/myanmar\\_burma/document.do?id=ar&yr=2005](http://www.amnestyusa.org/countries/myanmar_burma/document.do?id=ar&yr=2005) (hereinafter Amnesty Report) (noting several incidents of forced labor that took place in ethnic minority states). For a more detailed discussion about forced relocation, forced labor and rape, see Sections II.A.1, II.A.2 and II.A.3, respectively.

<sup>181</sup> See Dept. of State Report, *supra* note 69.

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*; see also Human Rights Watch Report, *supra* note 60 (noting that many ethnic minorities have been forced into internment camps where "forced labor, extrajudicial executions, rape and torture committed by government troops" is rampant); Dan Murphy, Long, *Quiet Ethnic War in Burma*, THE CHRISTIAN SCIENCE MONITOR, May 21, 2002 (hereinafter Long Quiet Ethnic War) (reporting that subsistence farmers often are forced to neglect their crops to act as porters for troops and rice fields are sown with landmines forcing people to live in SPDC garrison towns so that they can be a ready labor pool for the military).

<sup>184</sup> See Martin Smith, *Burma, Insurgency, and the Politics of Ethnicity*, Zed Books, 1991, at 258-262; see also Guy Horton Report, *supra* note 174, at 236 (noting that the Four Cuts policy is "official and systematic").

<sup>185</sup> See Section II.A.1 below for a more in depth discussion of destruction of villages, internally displaced persons, and refugees.

<sup>186</sup> See UK Report, *supra* note 80.

<sup>187</sup> See World Refugee Survey 2005: *Refugees and Asylum Seekers Worldwide*, U.S. Committee for Refugees and Immigrants, 2005, available at <http://www.refugees.org/article.aspx?id=1343> (hereinafter WRS 2005).

<sup>188</sup> See Jerrold Huguette and Dr. Sureeporn Punpuing, *International Migration in Thailand*, International Organization for Migration, 2005, at 23 (hereinafter International Migration in Thailand) (noting the number of Burmese in Thailand are 1.5-2 million and that many of them are displaced persons and irregular migrants); see also Veronika Martin, *Prospects for Hope? Myanmarese Refugees in Thailand*, World Refugee Survey 2005, at 21, available at <http://www.refugees.org/article.aspx?id=1342> (hereinafter Prospects for Hope) (noting that millions of Burmese live in Thailand undocumented as refugees, thus preventing them from obtaining assistance from UNHCR).

<sup>189</sup> See Therese M. Caouette and Mary E. Pack, *Pushing Past the Definitions: Migration from Burma to Thailand*, Refugees International and Open Society Institute, Dec. 2002, at 7.

### **3. Ethnic Opposition Nationalities**

Some ethnic nationalities have formed their own political parties and armies in opposition to the government. Ethnically-based political parties, including the Shan Nationalities League for Democracy, Arakan League for Democracy, and the Mon National Democratic Front, won seats in the 1990 election.<sup>190</sup> Furthermore, ethnic opposition groups, including the Karen National Union (KNU), the Karenni National Progressive Party (KNPP), the Chin National Front, and the Shan State National Army, have engaged in armed conflict with the Burmese National Army. Other political groups, such as the National Democratic Front, Democratic Alliance for Burma, and National Council for the Union of Burma, seek to unite the various ethnic groups and promote a common position.<sup>191</sup> Over time, the primary demand of ethnic opposition groups has shifted from independence to democracy and federalism. Burma's ethnic groups now primarily desire democracy so they can have a significant voice in the country's affairs.<sup>192</sup>

### **4. Ceasefire Agreements**

The government has entered into uneasy ceasefire agreements with 17 various ethnic insurgent groups.<sup>193</sup> While ceasefire agreements have brought an end to the fighting in some areas of Burma, they have also resulted in increased militarization and declining conditions for many ethnic nationalities, such as the Mon.<sup>194</sup> Most significantly, the ceasefires have not resulted in political settlements addressing the root causes of the armed conflict. Some ceasefires have subsequently broken down, while others have prompted new armed groups to form.<sup>195</sup> Many ethnic groups have maintained active resistance against the government. These groups include the Chin National Front, Shan State Army-South, KNPP, and KNU.<sup>196</sup> The KNU, one of the largest ethnic opposition groups, agreed to an informal ceasefire in December 2003, but still has not signed any formal documents with the SPDC.<sup>197</sup>

### **5. Renewed Ethnic Insurgency**

Despite the ceasefire negotiations and agreements, actions taken by the government and its military call into question their commitment to peace. Most notably, even after the ceasefire, Burmese troops continued to attack villages populated by ethnic minority groups,<sup>198</sup> and fighting continued in Karen regions.<sup>199</sup> Moreover, SPDC troops continued to commit serious abuses against the Karen by destroying their villages and uprooting them from their homes to gain control over their land.<sup>200</sup> The New

<sup>190</sup> See Khin Kyaw Han, *1990 Multi-Party Democracy General Elections*, Democratic Voice of Burma, available at [http://english.dvb.no/e\\_docs/19election\\_1990.pdf](http://english.dvb.no/e_docs/19election_1990.pdf), last visited Sept. 3, 2005.

<sup>191</sup> See *Burma: Country in Crisis: Ethnic Groups*, Open Society Institute Burma Project, 2001, available at <http://burmaproject.org/CRISIS/index.html>, last visited, Sept. 3, 2005.

<sup>192</sup> See *id.*

<sup>193</sup> See Long Quiet Ethnic War, *supra* note 183 (discussing the forced relocation of the Wa minority to a mostly ethnic-Shan area near the Thai border).

<sup>194</sup> See *The Mess in Myanmar*, *supra* note 106; see also *Statement on Shan State National Army and Shan State Army Merger*, May 24, 2005, available at [http://www.shanland.org/articles/war/2005/statement\\_on\\_shan\\_state\\_national.htm](http://www.shanland.org/articles/war/2005/statement_on_shan_state_national.htm).

<sup>195</sup> See *Burma: Army and Proxies Attack Shan Civilians*, Human Rights Watch, May 26, 2005; see also *Burma's Ceasefires: More Trouble Than They're Worth?*, IRRAWADDY MAGAZINE, Vol. 10, No. 2, Feb.-Mar. 2002.

<sup>196</sup> See Dept. of State Report, *supra* note 69.

<sup>197</sup> See Larry Jagan, *Analysis: Burma's Karen Talk Peace*, BBC NEWS, Jan. 22, 2002, available at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/3419323.stm>.

<sup>198</sup> See Dept. of State Report, *supra* note 69 (describing various credible reports of attacks on ethnic villages by Burmese army troops).

<sup>199</sup> See, e.g., *Burma SPDC Doesn't Respect Ceasefire Agreement, Says KNU*, Democratic Voice of Burma, Dec. 11, 2004, available at <http://english.dvb.no/news.php?id=3685>; Saw Enha, *The KNU Ceasefire "Agreement" One Year On: Real Progress or Still Just a Mess?*, Burma Issues, Jan. 2005, available at <http://www.burmaissues.org/En/Newsletter/BINews2005-01-01.html>.

<sup>200</sup> See *id.*

Mon State Party signed a ceasefire agreement with the government in 1995, but conditions continued to deteriorate in Mon state after the ceasefire.<sup>201</sup> The SPDC forcibly conscripted local farmers to work on development projects, and Burmese troops continued to battle Mon splinter groups.<sup>202</sup> A New Mon State Party Central Committee member noted that the group wanted dialogue to work “but if the SPDC does not want a political settlement and keeps oppressing our people, we may fight again.”<sup>203</sup> The government recently arrested the leader of one of the ceasefire groups, the Shan State National Army, as well as other prominent Shan leaders. In response to the arrests, the Shan State National Army broke ties with the SPDC and merged with the Shan State Army-South.<sup>204</sup> Most ethnic groups remain armed. Indeed, only one small ethnic group has actually surrendered its weapons.<sup>205</sup>

## **II. Burma’s Threat to Peace and Security in the Region and the Global Response**

### ***A. Transnational Destabilizing Effects of the Conflict in Burma***

It is difficult to overstate the suffering of the Burmese people. The situation is particularly dangerous because the government’s actions not only oppress its own people but bring substantial transnational destabilizing effects which threaten peace and security in the entire region. The gravity and extent of six particular factors distinguish the situation in Burma from that of any other country in the world. These factors include: (1) destruction of villages (and associated refugee flows); (2) forced labor; (3) systematic rape; (4) the illegal drug trade; (5) unchecked HIV/AIDS; and (6) child soldiers.

### **1. Destruction of Villages**

The SPDC has implemented a policy of destruction of villages and forced relocation of civilians as a counter-insurgency strategy for many decades, primarily targeting ethnic minority groups.<sup>206</sup> It is estimated that between 1996 and 2002 over 2,500 villages in eastern Burma have been destroyed, relocated, or abandoned.<sup>207</sup> Between 2002 and mid-2004, an additional 240 villages have been destroyed, relocated, or abandoned, displacing an additional 160,000 persons.<sup>208</sup> Forced relocation of civilians continues to persist in the present day, causing Burma to have “one of the world’s worst IDP [internally displaced persons] situations.”<sup>209</sup> These forced relocations often are accompanied by grave human rights abuses. In April 2005, the UN Commission on Human Rights urged the Burmese government to “end the systematic enforced displacement of persons and other causes of refugee flows to neighboring countries, to provide the necessary protection and assistance to internally displaced persons, in cooperation with the

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<sup>201</sup> See Tony Broadmoor, *Precarious Peace in Monland*, THE IRRAWADDY, Vol. 10, No. 2, Feb.-Mar. 2002.

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See *The Mess in Myanmar*, *supra* note 106; see also *Statement on Shan State National Army and Shan State Army Merger*, May 24, 2005, available at [http://www.shanland.org/articles/war/2005/statement\\_on\\_shan\\_state\\_national.htm](http://www.shanland.org/articles/war/2005/statement_on_shan_state_national.htm).

<sup>205</sup> See *id.*

<sup>206</sup> See Dept. of State Report, *supra* note 69.

<sup>207</sup> See *Burma: Displacement Continues Unabated in One of the World’s Worst IDP Situations*, Global IDP Project, Jun. 27, 2005, at 3 (hereinafter IDP Project Report).

<sup>208</sup> See *Internal Displacement and Vulnerability: Eastern Burma*, Thailand Burma Border Consortium, Oct. 2004, at 1-2 (hereinafter TBBC Report).

<sup>209</sup> See IDP Project Report, *supra* note 207, at 4.

international community, and to respect the right of refugees to voluntary, safe and dignified return monitored by appropriate international agencies.”<sup>210</sup>

**a. *Four Cuts Strategy and Modern Development Projects***

The government’s strategy of destruction of villages and forced relocation began as a part of the Burmese army’s Four Cuts strategy to systematically suppress ethnic opposition groups. Now, forced relocation also takes place in urban areas as the government pursues development projects.<sup>211</sup> The Four Cuts strategy has been used not only to destroy ethnic resistance but to assimilate and destroy the culture of ethnic minorities.<sup>212</sup> The destruction in Burma “clearly implies a scale of destruction far more comprehensive than what is generally understood as a counter insurgency campaign,” particularly since civilians are targeted solely on the basis of their ethnicity.<sup>213</sup>

Forced relocation also helps to provide labor for road building and infrastructure projects.<sup>214</sup> Experiences in Mon and Kachin states demonstrate that ceasefire agreements do not prevent the government from forcibly relocating civilians. In those states, the army has confiscated farmland and displaced people from their homes to carry out development projects without properly compensating them for either the relocation or the loss of their property.<sup>215</sup>

**b. *Human Rights Abuses Related to Forced Relocations***

Forced relocations often are accompanied by killings, forced labor,<sup>216</sup> systematic rape,<sup>217</sup> and wholesale destruction of villages, crops, and land. The Burmese army commonly gives civilians only one week’s notice to leave their village.<sup>218</sup> After the one-week notice period elapses, troops loot the village, destroying all buildings, crops, and stores of food to prevent villagers from returning.<sup>219</sup> The former UN Special Rapporteur on Myanmar, Rajsoomer Lallah QC, described the policy of forced relocation as a “scorched earth policy” in which soldiers forcibly seize, without payment, rice, poultry, and farm animals; what the army cannot eat it burns.<sup>220</sup> Massacres of civilians by the army in connection with forced relocation have been documented by various human rights groups. For example, a Human Rights Watch report cites various stories told by people in Karen state of troops attacking their villages, killing their family members, and destroying their crops.<sup>221</sup>

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<sup>210</sup> UN Economic and Social Council, Commission on Human Rights (61st Session, Agenda Item 9), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World – Situation of Human Rights in Myanmar*, E/CN.4/2005/L, Apr. 29, 2005 (hereinafter 2005 UN Commission Resolution).

<sup>211</sup> See Guy Horton Report, *supra* note 174, at 236.

<sup>212</sup> See *id.* at 236; see also “*They Came and Destroyed our Village Again*”: *The Plight of Internally Displaced Persons in Karen State*, Human Rights Watch, Jun. 2005, at 17 (hereinafter *Plight of Karen*) (noting that the government’s strategy has military and ethnic dimensions, allowing for the spread of state-sponsored ‘Burmanization’ in which minority cultures, histories, and political aspirations would be eliminated in favor of a national identity).

<sup>213</sup> See Guy Horton Report, *supra* note 174, at 237.

<sup>214</sup> See IDP Project Report, *supra* note 207, at 4-5.

<sup>215</sup> See generally *Plight of Karen*, *supra* note 212, at 54-57.

<sup>216</sup> For a more in-depth discussion of forced labor, see Section II.A.2.

<sup>217</sup> For a more in depth discussion of rape, see Section II.A.3.

<sup>218</sup> See IDP Project Report, *supra* note 207, at 4.

<sup>219</sup> See *id.*

<sup>220</sup> See Guy Horton Report, *supra* note 174, at 238.

<sup>221</sup> See *Plight of Karen*, *supra* note 212. The Human Rights Watch report recounts one woman’s story of atrocities committed by the army, in which she stated:

The Burmese Army troops first attacked in November 1979, while we were harvesting our fields near Ler Kaw village. They shot and killed my sister, who was only thirteen, and my cousin, who was fifteen. We

### **c. Internal Displacement**

The destruction of villages has led to a large number of IDPs; estimates of the total number vary. According to the Thailand Burma Border Consortium, at least 526,000 people in the eastern border areas alone remained internally displaced as of late 2004.<sup>222</sup> A 2002 estimate stated that between 1996 and 2002, 2,500 villages in eastern Burma were destroyed, relocated, or abandoned.<sup>223</sup> Between 2002 and mid-2004, an additional 240 villages were destroyed, relocated, or abandoned, displacing an additional 160,000.<sup>224</sup> Human Rights Watch estimates that, in eastern Burma alone, at least 650,000 people were internally displaced by late 2004 and that, since the 1960s, the military regime has created over 1 million IDPs.<sup>225</sup> Forced relocations were the most widespread in Karen, Kayah, and Shan states, a part of Mon state, and the Bago division.<sup>226</sup> In Arakan state in western Burma, Muslim groups such as the Rohingya often are forcibly relocated as a result of “brutal discrimination policies” so that new villages can be constructed for migrants from central and northern Burma.<sup>227</sup>

After being forced from their homes, IDPs are limited to only a few alternatives, including living on the fringes of urban and rural communities, hiding in the jungles or in zones of ongoing armed conflict, or living in areas controlled by the SPDC or various ethnic armed groups that have agreed to uncertain ceasefires with the government.<sup>228</sup> The number of such people living on the fringes of urban and rural communities is unknown.<sup>229</sup> Some IDPs who go into hiding stay in the jungles for a short period and then return to their villages, often to find that the village has been eradicated by the army to prevent resettlement.<sup>230</sup>

The army also reportedly has laid land mines close to the sites of such villages to prevent relocated civilians from returning.<sup>231</sup> Burma is estimated to be among the countries with the highest number of land mine casualties each year.<sup>232</sup>

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had to flee, but they chased after us and shot and killed another villager. There was no fighting near the village at that time. The Burma Army troops just wanted to kill us Karen villagers.

The Burmese soldiers attacked us again at Htee Hto Kaw Kee, in 1992. They shot and killed my husband and injured other villagers. The soldiers burned down our houses and killed and ate our animals. They also burned our rice barn, destroying 190 tons of rice. [They also] killed my son-in-law, who was just collecting betel nut in the forest. He [had] small children.

In January 1998, at Lo Kee village, my cousin's husband was killed by Burmese troops when they entered the village. Many people fled to the jungle. In March 2002 my other cousin's husband was also killed. Their house and livestock were destroyed too.

See also Guy Horton Report, *supra* note 174, at 260-280 for additional accounts of killings by the Burmese army.

<sup>222</sup> See *Internal Displacement and Vulnerability: Eastern Burma*, Thailand Burma Border Consortium, Oct. 2004, at 1-2 (hereinafter TBBC Report).

<sup>223</sup> See IDP Project Report, *supra* note 207, at 3.

<sup>224</sup> See TBBC Report, *supra* note 222, at 16.

<sup>225</sup> See *Plight of Karen*, *supra* note 212, at 8, 18.

<sup>226</sup> See Dept. of State Report, *supra* note 69. For a good discussion of the distribution of IDPs in the various states and divisions in Burma, including Shan state, Karenni state, Karen state, Mon state, Pegu division, and Tenasserim division, see TBBC Report, *supra* note 222, at 25-38.

<sup>227</sup> See IDP Project Report, *supra* note 207, at 4.

<sup>228</sup> See *Plight of Karen*, *supra* note 212, at 8. The TBBC Report identifies three types of IDPs: (1) those who hide in “free-fire areas”; (2) those who move to SPDC relocation sites; and (3) those who reside in ethnic administered ceasefire areas. See TBBC Report, *supra* note 222, at 9.

<sup>229</sup> See TBBC Report, *supra* note 222, at 9-10.

<sup>230</sup> See *Plight of Karen*, *supra* note 212, at 47.

<sup>231</sup> See IDP Project Report, *supra* note 207, at 6.

Moreover, even if villagers try to resettle in their native villages, the army often comes back to burn down the village again.<sup>233</sup> Many areas in Burma have been designated “free-fire” or “brown” zones by the military, meaning anyone found on site will be executed.<sup>234</sup>

Some IDPs hide in the jungle for several years, building temporary shelters, clearing areas to grow crops, foraging for food, and fishing in the streams.<sup>235</sup> Others attempt to stay on the official relocation sites, which vary in terms of amount of army control, available facilities, and infrastructure. Some relocation sites consist of merely empty stretches of land, requiring families to construct their own shelters, while other relocation sites are located in existing villages or towns.<sup>236</sup> The army strictly controls entry and exit from all the relocation sites.<sup>237</sup>

Health, economic, education, and welfare conditions are shockingly poor for IDPs, even in official relocation sites. IDPs face difficulty in obtaining food, with one survey of IDPs showing that three-quarters of respondents suffered food shortages for at least one month and 20 percent unable to access sufficient food for more than three months of the year.<sup>238</sup> In SPDC-controlled relocation sites, SPDC troops often deplete the food stock, and civilians often do not have time to cultivate their own crops because they are subject to long hours of forced labor by the troops.<sup>239</sup> Access to health care is limited, and one report states that eastern Burma has a “public health emergency” among the IDPs.<sup>240</sup> Child mortality rates and malnutrition rates among IDPs are double Burma’s national baseline rate and comparable to those recorded amongst IDPs in the Horn of Africa.<sup>241</sup> Mortality rates for IDP children under age 5 in eastern Burma are more than triple the country’s national average child mortality rate.<sup>242</sup> The acute malnutrition rate for children in IDP areas in eastern Burma is nearly double the national rate.<sup>243</sup> Maternal mortality rates in Karen, Karenni, and Mon states are greater than 1,000 maternal deaths per 100,000 births. Furthermore, surveys in many areas indicate that maternal mortality rates have reached “emergency” levels.<sup>244</sup> By comparison, Thailand’s maternal mortality rate is a mere 36 per 100,000.<sup>245</sup>

Water and sanitation facilities in relocation camps often are inadequate or nonexistent, and malaria, anemia, fever, chicken pox, and serious gastrointestinal problems are common.<sup>246</sup> Health clinics

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<sup>232</sup> See *id.*

<sup>233</sup> See Guy Horton Report, *supra* note 174, at 50 (displaying a graph indicating average household moves in the past year for various states and divisions, with Karen state averaging 7 household moves in the last year).

<sup>234</sup> See TBBC Report, *supra* note 222, at 8.

<sup>235</sup> See Plight of Karen, *supra* note 212, at 47.

<sup>236</sup> See IDP Project Report, *supra* note 207, at 4. See also Plight of Karen, *supra* note 212, at 47-51. The Human Rights Watch Report regarding the plight of the Karen classifies relocation sites into “Relocation Centers” and “Relocation Villages”. Relocation Centers are constructed settlements typically found near infrastructure projects and army bases. Relocation Villages are pre-existing settlements found in rural areas and are generally smaller than Relocation Centers and more difficult to document and map. *Id.*

<sup>237</sup> See IDP Project Report, *supra* note 207, at 4.

<sup>238</sup> See TBBC Report, *supra* note 222, at 50.

<sup>239</sup> See *Christian Solidarity Worldwide Visit to the Thai-Burmese Border: April 19-26, 2004*, Christian Solidarity Worldwide UK/Australia, at 8 (hereinafter CSW Report).

<sup>240</sup> See TBBC Report, *supra* note 222, at 3.

<sup>241</sup> See *id.*

<sup>242</sup> See *id.* at 5. The under-5 child mortality for IDPs is 2.4 deaths per 10,000 each day for the population, while the national average child mortality rate in Burma is 0.7 deaths per 10,000 each day.

<sup>243</sup> See *id.* The acute malnutrition rate for children in IDP areas in Eastern Burma is 16 percent, while the national average is 9 percent.

<sup>244</sup> See UN Commission on Human Rights, NGO Statement by Asia Pacific Forum on Women, Law and Development (61st Session), Apr. 11, 2005, available at [http://www.apwld.org/statement\\_61st.htm](http://www.apwld.org/statement_61st.htm).

<sup>245</sup> See *id.*

<sup>246</sup> See IDP Project Report, *supra* note 207, at 7; Plight of Karen, *supra* note 212, at 53.

in IDP relocation sites often do not have medicines and are not staffed with medical personnel.<sup>247</sup> To make matters worse, Burmese troops also have engaged in the systematic destruction of health clinics.<sup>248</sup> Many areas only obtain medical treatment through medical “backpack” teams, consisting of individuals trained as health care workers.<sup>249</sup> Approximately 70 backpack teams work in the ethnic states, primarily Karen, Karenni, Mon, and Shan states, with each team having only two or three individuals who serve approximately 2,000 people.<sup>250</sup> Most humanitarian-based assistance to relocation sites comes from local community-based networks and local NGOs.<sup>251</sup> International humanitarian organizations are not permitted to access many of Burma’s border areas where IDPs have been relocated, and the international organizations and agencies that are working in the country are subject to tight controls.<sup>252</sup> Thus, the large majority of IDPs who need humanitarian assistance are cut off from international relief.

#### **d. External Displacement**

Aside from creating a large population of IDPs, the destruction of villages and forced relocations have also resulted in a large number of externally displaced people. Estimates from a 2005 survey on refugees show 453,500 Burmese refugees in Thailand (comprising mostly ethnic Karen, Shan, and Karenni, along with some ethnic Burman pro-democracy activists), 60,000 in India, 150,000 in Bangladesh, and 25,000 in Malaysia.<sup>253</sup> Additionally, there are millions of Burmese living in Thailand who are not documented and live as economic migrants.<sup>254</sup> An unknown number of mostly ethnic Kachin have fled to China.<sup>255</sup> Japan and South Korea also had smaller numbers of refugees from Burma.<sup>256</sup>

Thailand has received the largest influx of refugees, primarily from eastern Burma, and has struggled with ways to deal with the millions who have fled across the border. Thailand is not a signatory to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.<sup>257</sup> The Government of Thailand defines a “refugee” as a person who was actually fleeing fighting when he or she left Burma.<sup>258</sup> Thus, persons fleeing Burma as a result of human rights abuses such as forced labor, killings, rapes, forced relocation, destruction of villages, and destruction of food crops are not considered refugees and are discouraged from entering Thailand.<sup>259</sup>

In addition to the vast numbers of refugees from eastern Burma in Thailand, Muslim Rohingya refugees from western Burma have fled to Malaysia and Bangladesh. More than 250,000 Muslim Rohingyas fled Burma to Bangladesh in the early 1990s, and about 235,000 Rohingyas were

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<sup>247</sup> See Guy Horton Report, *supra* note 174, at 463.

<sup>248</sup> See generally Guy Horton Report, *supra* note 174, at 463-475; see also *Christian Solidarity Worldwide Visit to the Thai-Burmese Border – April 9-15, 2005*, Christian Solidarity Worldwide (reporting on a visit to an IDP camp inside Burma on Apr. 12, 2005).

<sup>249</sup> See CSW Report, *supra* note 239, at 9-10.

<sup>250</sup> See *id.* at 10. Chin state has only 9 backpack teams working near the Indian border. *Id.*

<sup>251</sup> See IDP Project Report, *supra* note 207, at 8.

<sup>252</sup> See *id.*

<sup>253</sup> See WRS 2005, *supra* note 187. Many of the refugees in Malaysia live in harsh conditions in jungle camps on the outskirts of urban areas. The Government of Malaysia recently has stated its intent to offer temporary stay permits to the refugees, which hopefully will improve their access to health care, education, and other social services. See *Refugees in Malaysia’s Jungle Camps Face Harsh Life, Fear Crackdown*, UNHCR NEWS STORIES, Nov. 30, 2004.

<sup>254</sup> See *Prospects for Hope*, *supra* note 188, at 21.

<sup>255</sup> See *World Refugee Survey 2003 Country Report: Myanmar (Burma)*, U.S. Committee for Refugees and Immigrants, 2003, available at <http://www.refugees.org/countryreports.aspx?subm=&ssm=&cid=208>.

<sup>256</sup> See *id.*

<sup>257</sup> See *Time for Change*, *supra* note 17, at 31.

<sup>258</sup> See *id.*; see also *Out of Sight, Out of Mind: Thai Policy Toward Burmese Refugees*, Human Rights Watch, Feb. 2004, at 10 (hereinafter, *Out of Sight*).

<sup>259</sup> See *id.* at 11.

repatriated.<sup>260</sup> Approximately 20,500 Rohingyas remain in government-run camps in Bangladesh. Six thousand Rohingyas are living in precarious conditions in Teknaf, an area of Bangladesh highly prone to flooding and cyclones.<sup>261</sup>

## **2. Forced Labor**

Forced labor is a pervasive problem in Burma. The military junta compels more than 800,000 Burmese to work as porters or laborers for little or no pay.<sup>262</sup> Until the early 1990s, the Government of Burma forced ethnic minorities to work in counter-insurgency activities, primarily as porters.<sup>263</sup> Since the early 1990s, hundreds of thousands of civilians have been forced to work on infrastructure projects that involve the construction of roads, dams, railroads, and military barracks.<sup>264</sup> Civilians who refuse to provide mandatory labor are often threatened with prosecution, and those laborers who do not properly carry out their tasks are often shot or beaten to death.<sup>265</sup>

In June 2000, for the first time in its history, the UN International Labor Organization (ILO) adopted a resolution under Article 33<sup>266</sup> of its constitution to compel the Government of Burma to comply with its obligations under the Forced Labor Convention (No. 29) of 1930.<sup>267</sup> The ILO resolution was intended to “secure compliance with the recommendations of the Commission of Inquiry<sup>268</sup>” which found massive and systematic violations of the Forced Labor Convention:

528. There is abundant evidence before the Commission showing the pervasive use of forced labor imposed on the civilian population throughout [Burma] by the authorities and the military . . .

543. This report reveals a saga of untold misery and suffering, oppression and exploitation of large sections of the population . . . It is the story of gross denial of human rights to which the people . . . have been subjected . . . The Government seem[s] oblivious to the human rights of the people and are trampling upon them with impunity. Their actions gravely offend human dignity and have a debasing effect on civil society.<sup>269</sup>

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<sup>260</sup> See Time for Change, *supra* note 17, at 32; see also *Rohingyas from Myanmar Living in Risky Conditions in Bangladesh*, UNHCR NEWS STORIES, Jul. 19, 2005, available at <http://www.unhcr.ch/cgi-bin/texis/vtxsx/print?tbl=NEWS&id=42dcf74a4> (hereinafter *Risky Conditions in Bangladesh*).

<sup>261</sup> See *Risky Conditions in Bangladesh*, *supra* note 260. The UNHCR, the European Commission and various diplomats have urged the Bangladesh government to move the refugees in Teknaf to safer ground. *Id.*

<sup>262</sup> *Burma Slammed Over Forced Labor*, BBC NEWS, Jun. 17, 1999.

<sup>263</sup> Amnesty International, *Amnesty International's Concerns at the 89<sup>th</sup> International Labor Conference*, Jun. 5-21, 2001, available at <http://web.amnesty.org/library/print/ENGIOR420042001>.

<sup>264</sup> See *id.* (asserting that forced labor still takes place in Shan, Kayin, and Mon states and in the Tanintharyi division).

<sup>265</sup> See *id.* (noting reports of civilians who witnessed the junta's murder of laborers who were unable to adequately perform their duties); *A Global Alliance Against Forced Labour*, Report of the Director General, 93rd Sess., Geneva, Jun. 2005, para. 105 (describing the police's threats to prosecute villagers who refused to work for them).

<sup>266</sup> Article 33 of the ILO Constitution authorizes the Governing Body of the ILO to “recommend . . . such action as it may deem wise and expedient to secure compliance” with recommendations of a Commission of Inquiry that has been established to investigate violations of a labor convention.

<sup>267</sup> *Convention Concerning Forced or Compulsory Labor* (No. 29), Entered into Force on May 1, 1932, Ratified by Burma on Mar. 4, 1955.

<sup>268</sup> See Resolution Submitted to the International Labor Conference in its 88<sup>th</sup> Session (May-Jun. 2000) on Recommendations of the Commission of Inquiry Established to Examine the Observance of the Forced Labor Convention, 1930 (No. 29) in Myanmar.

<sup>269</sup> *Forced Labor in Myanmar (Burma)*, Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labor Organization to examine the observance by Myanmar of the Forced Labor Convention, 1930 (No. 29), Geneva, Jul. 2, 1998.

On November 17, 2000, after determining that Burma remained out of compliance with the Forced Labor Convention, the ILO Governing Body<sup>270</sup> opened the way for the full implementation of its previous resolution, including authorizing its members to impose sanctions against the Government of Burma.<sup>271</sup> At the same time, however, the passage of the resolution does not require ILO members to do anything other than reexamine their relationship with Burma in light of the findings of the Commission of Inquiry (although there are other peripheral positive effects).<sup>272</sup>

In the five years since the ILO sanctioned the Government of Burma, the ILO has taken various steps to put an end to forced labor, such as (1) designating a liaison officer who communicates regularly with high-level government officials; (2) organizing seven field observation teams to direct the implementation of Convention No. 29 and to investigate violations; (3) developing a Joint Plan of Action between the Government of Burma and the ILO; and (4) translating administrative orders banning forced labor into six indigenous languages.<sup>273</sup>

Despite all these efforts, however, the ILO recently concluded it still lacks a tenable solution for ending forced labor in Burma:

The Myanmar case . . . demonstrates that it is impossible to make effective progress against forced labor when there is a climate of impunity and repression against persons who denounce forced labor abuses, in the absence of the political will to clamp down on the military and local authorities who are themselves deriving economic advantage from forced labor practices.<sup>274</sup>

### **3. Rape**

Recent years have brought greater attention to the widespread acts of sexual violence committed against women by the Burmese armed forces, particularly against women of ethnic nationality groups. Numerous reports have documented the stories of women of Burma's different ethnic groups who have experienced or observed sexual violence firsthand.<sup>275</sup> In 2002 and 2003, the UN Special Rapporteur on

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<sup>270</sup> The Governing Body is the executive body of the International Labor Office (the office is the secretariat of the organization). It is composed of 56 titular members (28 governments, 14 employers and 14 workers) and 66 deputy members (28 governments, 19 employers and 19 workers). *See generally*, ILO web site: <http://www.ilo.org/public/english/standards/relm/gb/index.htm>.

<sup>271</sup> "ILO Governing Body opens way for unprecedented action against forced labor in Myanmar," ILO/00/44, Nov. 17, 2000.

<sup>272</sup> First, under Article XIX(6) of the ILO Constitution, the passage of the resolution required that members of the ILO bring the recommendations "before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action" within the next 12-18 months. Second, the resolution may be evidence of *opinio juris*, emerging international opinion on the situation of forced labor in Burma. And finally, as a corollary to the last point, countries that are signatories to the Forced Labor Convention and voted for the resolution against Burma may find those positions advantageous if they would seek to justify the imposition of economic sanctions against Burma under the General Agreement on Tariffs and Trade (GATT).

<sup>273</sup> *See* Report of the Director General, *supra* note 265, para. 104-08 (explaining that the Joint Plan of Action will involve "awareness raising and information dissemination on the abolition of forced labor; the establishment of an independent facilitator, with the role of assisting possible victims of forced labor in Myanmar to seek redress; and a pilot program in a special focus region where the prohibition on forced labor would be strictly enforced and an ILO-assisted labor-intensive road construction project would serve to demonstrate the feasibility of this approach without recourse to forced labor").

<sup>274</sup> *Id.* at para. 108-09.

<sup>275</sup> *See, e.g., No Safe Place: Burma's Army and the Rape of Ethnic Woman*, Refugees International, Apr. 20, 2003 (hereinafter *No Safe Place*) (focusing on stories of rape of women in the Karen, Karenni, Mon, and Tavoyan ethnic groups); *License to Rape: the Burmese Military Regime's Use of Sexual violence in the Ongoing War in Shan State*, Shan Human Rights Foundation & Shan Women's Action Network, May 2002 (hereinafter *License to Rape*) (detailing 173 incidents of rape and other forms of sexual violence involving 625 women committed by Burmese army troops in Shan state); *Shattering Silences: Karen Women Speak Out About the Burmese Military Regime's Use of Rape as a Strategy of War in Karen State*, Karen Women's Organization, Apr. 2004 (hereinafter *Shattering Silences*) (documenting systematic rape committed by the Burmese army against Karen women); *Catwalk to the Barracks: Conscripted Women for Sexual Slavery and Other Practices of Sexual Violence by Troops of the Burmese*

Human Rights in Myanmar submitted reports to the Commission on Human Rights detailing incidents of rape and other forms of sexual violence against women and girls in Burma by SPDC troops.<sup>276</sup> The UN Special Rapporteur on Violence Against Women also received credible reports of women and girls subjected to sexual violence by government troops to “intimidate the local population, to extract information from female detainees and to extract bribes.”<sup>277</sup> The Special Rapporteur further noted that “the rape and sexual abuse of women and girls by government forces has been ‘a regular feature in the mode of operation of the army in its campaign of incursions into the insurgency zones or elsewhere in the relocation sites.’”<sup>278</sup> The US State Department’s most recent 2004 report on human rights in Burma noted “credible reports of government soldiers raping women who were members of ethnic minorities in Karen state, Shan state and Mon state.”<sup>279</sup> As a result of the overwhelming evidence of sexual violence against women and girls committed by the Burmese army, the UN General Assembly adopted a resolution in 2003 “express[ing] grave concern at . . . rapes and other forms of sexual violence carried out by members of the armed forces” and the “disproportionate suffering of ethnic minorities, women and children from such violations.”<sup>280</sup>

The UN Security Council has also recognized the impact of sexual violence on international peace and security and the importance of protecting women from such acts. In Resolution 1325, adopted in 2002, the Security Council recognized that “an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security.”<sup>281</sup> The Security Council called on all parties to armed conflict “to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.”<sup>282</sup> In addition, the Security Council emphasized that all nations have the responsibility “to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls.”<sup>283</sup>

The Security Council has also acknowledged the problem of rape and sexual violence in other strife-torn regions. In July 2005, the UN High Commissioner for Human Rights, Louise Arbour, produced a report on rape and sexual violence in Sudan’s Darfur region, in accordance with Security Council Resolution 1590 establishing the UN Mission in Sudan to carry out human rights promotion, civilian protection, and monitoring activities.<sup>284</sup> The High Commissioner’s report described rapes perpetrated by armed forces in Darfur and called on the Government of Sudan to bring an end to sexual violence by “acknowledg[ing] the scope of the problem and tak[ing] action to end the climate of impunity that continues to fuel sexual violence in Darfur” and by making “timely and credible investigations and

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*Military Regime in Mon Areas*, Woman and Child Rights Project & Human Rights Foundation of Monland, Jul. 2005 (hereinafter *Catwalk to the Barracks*) (documenting 37 incidents of sexual violence against 50 women by Burmese troops despite ceasefires signed between the main Mon political party and the SPDC).

<sup>276</sup> UN Economic and Social Council (58th Session), *Situation of Human Rights in Myanmar*, A/58/219, Aug. 5, 2003; United Nations Economic and Social Council, Commission on Human Rights (58th Session), *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, E/CN.4/2002/83/Add.1, Jan. 28, 2002.

<sup>277</sup> See UN Economic and Social Council (57th Session), *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, E/CN.4/2001/73, Jan. 23, 2001.

<sup>278</sup> See *id.* (quoting *Situation of Human Rights in Myanmar: Report of the Special Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights Resolution 1999/17*, E/CN.4/2000/38, at para. 50).

<sup>279</sup> See Dept. of State Report, *supra* note 70.

<sup>280</sup> Resolution 57/231, *Situation of Human Rights in Myanmar*, UN General Assembly, A/Res/57/231, adopted Feb. 28, 2003.

<sup>281</sup> UN Security Council, Resolution 1325, S/Res/1325, adopted Oct. 13, 2000.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> See *Access to Justice for Victims of Sexual Violence*, Report of the United Nations High Commissioner for Human Rights, Jul. 29, 2005 (hereinafter *Darfur Report*); see also Resolution 1590, UN Security Council, S/Res/1590, adopted Mar. 24, 2005 (establishing the United Nations Mission in Sudan).

safe prosecutions of sexual violence” to “make it clear to the main perpetrators of sexual violence that rape will no longer be tolerated.”<sup>285</sup>

The Burmese army perpetrates rapes and other forms of sexual violence against women and girls in the context of armed conflict. Rape is a weapon the Burmese army wields to demoralize and weaken ethnic minorities. In a report discussing rape in Shan state, 83 percent of 173 incidents documented in the report were actually committed not by common soldiers but by military officers.<sup>286</sup> Many incidents of rape have occurred inside military bases.<sup>287</sup> Greater militarization has been linked to increasing incidents of rape.<sup>288</sup> The army has used rape and violence against women as weapons in its anti-insurgency campaigns against ethnic opposition groups. Women who have been raped by military personnel often have been accused of supporting ethnic insurgents. For example, one report detailed how two married Karen women were beaten, tortured, and raped repeatedly by Burmese troops who had accused the women’s husbands of being Karen soldiers.<sup>289</sup> In addition to using rape as a weapon of war against ethnic insurgents and ethnic minorities, Burmese soldiers also use rape as part of a campaign of “Burmanization,” evidencing a policy of ethnic cleansing. Burmese soldiers aim to impregnate ethnic minority women so that the women will bear “Burman” babies.<sup>290</sup> In another “Burmanization” tactic, some Burmese troops have forced women to marry them after raping them.<sup>291</sup>

The Burmese army also has coerced women to serve as sexual slaves on military bases. When the SPDC army sets up military bases near villages, the villages often must provide the soldiers with young women whose role is entertain and serve the soldiers.<sup>292</sup> One report from Mon state described a “Fashion and Beauty Show” organized by SPDC troops: fifteen villages were ordered to send young unmarried Mon women to the beauty show or had to pay a fine of 150,000 kyat to the army.<sup>293</sup> Prior to the beauty contest, the women had to spend several nights at the SPDC army base, where they were forced to work and to “entertain” soldiers at night.<sup>294</sup> The soldiers also required the women to “practice” for the beauty contest and sexually molested the women during these practice sessions.<sup>295</sup>

Rape often is linked to forced relocation.<sup>296</sup> In some instances, the process of forced relocation also includes systematic rape. The forms of violence the Burmese Army practices on civilians while

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<sup>285</sup> See Darfur Report, *supra* note 284.

<sup>286</sup> See License to Rape, *supra* note 275, at 9.

<sup>287</sup> See *id.* at 11.

<sup>288</sup> See No Safe Place, *supra* note 275, at 8 (noting that “when more soldiers are sent to an area, typically more rape occurs”).

<sup>289</sup> See Catwalk to the Barracks, *supra* note 275, at 14.

<sup>290</sup> See No Safe Place, *supra* note 275, at 45.

<sup>291</sup> See No Safe Place, *supra* note 275, at 46.

<sup>292</sup> See Catwalk to the Barracks, *supra* note 275, at 17-18. The village headman from one Mon village explained the conscription of women for sexual slavery at army bases, stating:

“[The SPDC troops] took 3 women, married or unmarried, every day. They said they wanted only women under 30 years old. In their bases, they forced the women to sing songs, serve liquor to them, feed them with food, give them a massage at nighttime, and at daytime, they forced them to do work such as cooking food, carrying water, and finding fire-wood. They also threatened the women that if they fled, they would be killed. After one night and one day, we had to send another 3 women. At first, I refused to send women to them. Then they beat me severely and said that if I didn’t obey their orders, they would kill me. Therefore, I was afraid and had to approach the community women to send the women . . . After (the karaoke and drinking) party, the officers took the beautiful women and raped them.”

*Id.*

<sup>293</sup> See *id.* at 15.

<sup>294</sup> See *id.* at 17.

<sup>295</sup> See *id.*

<sup>296</sup> See, e.g., License to Rape, *supra* note 275, at 15 (noting that 76 percent of the rape cases documented in the report were in areas where the rural population had been forcibly relocated).

forcing them out of their villages include rapes of girls and women.<sup>297</sup> Moreover, if troops catch a woman attempting to return to her native village or hiding in the jungle or forest after being forcibly relocated, the woman will be raped by the troops and even killed.<sup>298</sup> In other instances, women flee their villages out of fear of rape. For example, in a report by Refugees International, every woman interviewed for the report stated that they fled their homes because they could no longer endure the human rights abuses inflicted on them, including rape, by the army.<sup>299</sup> Women also have been raped in relocation sites. For example, in a report regarding sexual violence in Shan state, some of the rape incidents reported actually took place within relocation sites.<sup>300</sup>

The SPDC army's practices of forced labor also leave women more vulnerable to rape.<sup>301</sup> First, when troops arrive at a village, the men often must flee in order to avoid being compelled to work for the army. The men's flight from the village leaves the women especially vulnerable to sexual violence by troops.<sup>302</sup> Second, sometimes women are forced to work for the SPDC troops and are raped while performing their work.<sup>303</sup>

Most rape victims do not report the abuses because they often see reporting the crime as futile, do not want to draw attention to themselves, and fear retribution. Indeed, victims of rapes lack any means of effective recourse for the crimes committed against them. When a woman or her family does report a rape, often no action is taken, or the rapist's punishment is minimal. Other difficulties facing rape victims in reporting the crime include inability to speak the Burmese language and not knowing the name or military unit of the perpetrator.<sup>304</sup> Furthermore, because women victims often must continue to live side by side with the soldiers who attacked them, many choose to suffer in silence rather than risk retaliation from the resident soldiers.<sup>305</sup> The government has prohibited the UN Special Rapporteur on Human Rights in Myanmar from visiting certain areas in the country to investigate stories of rape collected from refugees in Thailand.<sup>306</sup>

#### **4. Drugs**

Burma is a major producer and supplier of illicit drugs to international markets.<sup>307</sup> In 2001, "Burma accounted for approximately 80 percent of Southeast Asia's opium and heroin production, and approximately 69 percent of the world's opium production."<sup>308</sup> Today, as a result of a decline in production in Burma as well as increased production in Afghanistan, Burma is the "world's second largest

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<sup>297</sup> See License to Rape, *supra* note 275, at 15 (describing a Shan family's experience in being forcibly relocated in which the soldiers gang-raped the teenage daughter and killed her).

<sup>298</sup> See *id.* at 16-17 (describing women being gang-raped by troops and eventually shot dead because they were living in hiding near a town after being forcibly relocated).

<sup>299</sup> See No Safe Place, *supra* note 275, at 27 (describing "an atmosphere of pervasive fear" among women, "in which the sight of a Burmese army uniform would provoke flight"); see also Catwalk to the Barracks, *supra* note 275, at 25; Shattering Silences, *supra* note 275, at 23-24 (telling the stories of women being forced to work as porters and raped by soldiers).

<sup>300</sup> See License to Rape, *supra* note 275, at 18.

<sup>301</sup> See Section II.B.2 for a detailed discussion of forced labor practices in Burma.

<sup>302</sup> See License to Rape, *supra* note 275, at 19-20.

<sup>303</sup> See *id.* at 20; Catwalk to the Barracks, *supra* note 275, at 19-21 (detailing rape incidents of women forced to work in agricultural areas and to work as guards for the Burmese army);

<sup>304</sup> See *id.*

<sup>305</sup> See No Safe Place, *supra* note 275, at 35.

<sup>306</sup> See UN Economic and Social Council (61st Session), *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World: Situation of Human Rights in Myanmar*, Dec. 2, 2004 (stating that the Special Rapporteur offered to conduct independent assessments of allegations of sexual violence against ethnic women but had received no response from the Burmese government to this offer). The Special Rapporteur also noted that the government claimed that the rape allegations are "part of an anti-governmental agenda and are, in fact, propaganda of war waged with ill intent to slander and discredit the Myanmar Armed Forces, and to cause disunity and distrust among the national races."

<sup>307</sup> *Drug Intelligence Brief: Burma Country Report*, Drug Enforcement Agency, May 2002 (hereinafter DEA Report).

<sup>308</sup> *Id.*

producer of illicit opium and heroin.”<sup>309</sup> Primarily through support from China and the UN, the Government of Burma has managed to contribute to this reported decline in output through various eradication measures, such as crop substitution programs.<sup>310</sup> These efforts, however, do not account for the total decline in any significant way. Instead, other factors, such as changing weather and soil conditions, as well as purported efforts by the regime and its affiliates to cultivate new areas, offer likelier explanations for a majority of the reported decline. In recent years, an additional major cause for the decline in opium production and heroin exports has been Burma’s diversification of drug ventures, allowing it to secure its position as a “primary source of amphetamine-type stimulants”<sup>311</sup> (ATS) or methamphetamines. As a result, despite the decrease in heroin production, Burma has in fact managed to increase its overall output of illicit drugs. And while it is in second place worldwide with respect to opiate exports, it still ranks well above other opium-producing countries, including Laos, which is in third place.<sup>312</sup>

Although the regime claims to have undertaken substantial steps to reduce opium production in recent years, these efforts have failed to produce any substantial decrease in drug production. Frequently, the regime will seize drug caches and then publicly destroy them. Many observers dismiss these displays as mere public relations exercises that are in no way indicative of real efforts.<sup>313</sup> Such seizures by the regime only account for a tiny fraction of the country’s output.<sup>314</sup> In contrast, China in 2004 seized more ATS than any other country in the world, primarily along areas bordering Burma.<sup>315</sup>

US officials believe that the regime’s claimed commitment to controlling drug production in Burma is “questionable.”<sup>316</sup> As a consequence, the US consistently refuses to certify Burma as a nation cooperating with drug eradication measures.<sup>317</sup> In 2004, despite the continuous drop in reported opiate production rates, the US again refused to certify Burma, stating that it has “failed demonstrably” to meet its international counter-narcotics obligations.<sup>318</sup> Indeed, Burma was the only country the US refused to certify.<sup>319</sup> The US asserts that the SPDC’s inability to maintain a counter-narcotics program in the country is in part a result of Burma’s human rights violations and the regime’s unwillingness to yield control of the country to the elected NLD.<sup>320</sup>

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<sup>309</sup> *U.S. Takes Aim at Drugs in Burma, Afghanistan*, RADIO FREE ASIA, Mar. 4, 2005. Afghanistan is currently the number one producer; see also *A Failing Grade: Burma’s Drug Eradication Efforts*, ALTSEAN, 2004 (hereinafter *A Failing Grade*). According to ALTSEAN, opium production rates in Burma and Afghanistan have fluctuated over the years based on factors which include weather patterns.

<sup>310</sup> *International Narcotics Control Strategy Report 2005*, Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State, Mar. 2005 (hereinafter *International Narcotics Control Strategy Report 2005*).

<sup>311</sup> *U.S. Takes Aim at Drugs in Burma, Afghanistan*, *supra* note 309.

<sup>312</sup> *International Narcotics Control Strategy Report 2003*, Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State, Mar. 2003 (hereinafter *International Narcotics Control Strategy Report 2003*).

<sup>313</sup> See Aung Zaw, *Making Inroads, An Interview with Jean-Luc Lemahieu* (head of the UN Office of Drugs and Crime (“UNODC”)), IRRAWADDY, Vol. 11, No. 4, 17, May 2003. The UNODC gives little credence to the regime’s public burnings of seized drugs which are seen as little more than public relations, and not proof of eradication efforts.

<sup>314</sup> *International Narcotics Control Strategy Report 2005*, *supra* note 310. “Opium, heroin and morphine seizures represent approximately 2.3 percent of Burma’s 2003-year maximum potential opium production.”

<sup>315</sup> *International Narcotics Control Strategy Report 2005*, *supra* note 310.

<sup>316</sup> See *Drug Control: U.S. Heroin Control Efforts in Southeast Asia*, Testimony for the Subcommittee on National Security, International Affairs, and Criminal Justice, Committee on Government Reform and Oversight, House of Representatives, Statements by Jess T. Ford, Associate Director, International relations and Trade Issues, National Security and International Affairs Division, released by the United States General Accounting Office, Sept. 19, 1996 (hereinafter *GAO Drug Control Report*).

<sup>317</sup> *A Failing Grade*, *supra* note 309, at 38-42.

<sup>318</sup> *U.S. Takes Aim at Drugs in Burma, Afghanistan*, *supra* note 309.

<sup>319</sup> *Id.*

<sup>320</sup> *GAO Drug Control Report*, *supra* note 316.

None of the various explanations for Burma's decline in opium production involve good faith efforts by the regime and its affiliates. One factor related to the decline is the shift in weather patterns, accounting for certain reductions.<sup>321</sup> Second, in recent years there has been a shift away from opiates and toward ATS, which is increasingly in demand, particularly in Thailand.<sup>322</sup> Thailand is currently undergoing an epidemic of ATS abuse which is disproportionately affecting Thai youth.<sup>323</sup> ATS production costs are low and the drugs are easy to conceal and transport, making ATS production a very lucrative venture for the Burmese.<sup>324</sup> Another possible reason behind the recent decline in Burmese heroin production is the relocation of many of the Wa people,<sup>325</sup> the ethnic group most associated with the drug trade,<sup>326</sup> from the northern part of Shan state to south Shan. The regime announced the mass relocation would separate the Wa from their opium fields near China. Some observers, however, believe the relocation was simply intended to provide the drug cultivators with more land,<sup>327</sup> while appeasing Chinese requests for the cessation of trafficking through southern China from Burma.

Production of heroin, including poppy cultivation and the refinement process, takes place in Burma's remote, mountainous border regions. Shan state traditionally has been the primary host to heroin production.<sup>328</sup> Armed ethnic groups in this area such as the United Wa State Army (UWSA) have been leading producers; they also traffick in methamphetamines.<sup>329</sup> Originally, these ethnic groups used drug venture profits to finance their armies in the long struggle for autonomy from the Burmese.<sup>330</sup> But in 1989, these ethnic groups signed ceasefire agreements with the Government of Burma.<sup>331</sup> The justification that drug production finances their freedom struggles holds little legitimacy today. Instead, the UWSA today is regarded simply as drug dealers with interestingly suspect ties to the regime. For example, UWSA fighters are able to move drug shipments through military and police checkpoints without difficulties, while humanitarian workers coming into the Wa region require special visas—issued not by the Burmese government but by the UWSA.<sup>332</sup>

The level of the regime's involvement with Burma's drug trade has been the focus of much suspicion and debate over the years. Evidence has shown that many meagerly paid lower-level officers in the Tatmadaw—the national army—are willing to ignore the drug trade in exchange for bribes and payoffs.<sup>333</sup> Evidence also shows that military officers strong-arm farmers into working for the drug trade. For example, in an interview relating to forced labor, one Burmese farmer insisted that “the military asks us to do opium farming and people can't refuse to do it.”<sup>334</sup>

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<sup>321</sup> *A Failing Grade*, *supra* note 309, at 19.

<sup>322</sup> *A Failing Grade*, *supra* note 309, at 19.

<sup>323</sup> Dr. Christopher Beyrer, *Methamphetamine Users in Northern Thailand: Changing Demographics and Risks for HIV and STD Among Treatment Seeking Substance Abusers*, INT'L J. OF STD AND AIDS, 2004.

<sup>324</sup> *A Failing Grade*, *supra* note 309, at 59.

<sup>325</sup> *A Failing Grade*, *supra* note 309, at 19.

<sup>326</sup> International Narcotics Control Strategy Report 2005, *supra* note 310.

<sup>327</sup> *A Failing Grade*, *supra* note 309, at 19.

<sup>328</sup> DEA Report, *supra* note 307.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *List of Ceasefire Agreements with the Junta*, Irrawaddy.com, at <http://www.irrawaddy.org/res/ceasefire.html>, last updated Jan. 2004.

<sup>332</sup> *A Failing Grade*, *supra* note 309 at 56. This right to cross government-controlled areas was actually negotiated; however, often these caravans of drug shipments are barely concealed, and there is no question the regime knows of their existence yet does not nothing to stop them.

<sup>333</sup> *A Failing Grade*, *supra* note 309 at 110-112; International Narcotics Control Strategy Report 2005, *supra* note 310.

<sup>334</sup> *We are Not Free to Work For Ourselves: Forced Labor and Other Human Rights Abuses in Burma*, Earthrights International, May 14, 2002. See also *A Failing Grade*, *supra* note 309, at 109-111. The soldiers are then understood to demand a tax from the production of the crop.

Despite the regime's occasional flamboyant drug-burning shows,<sup>335</sup> substantial clues signal a high degree of likelihood that the government is not merely complicit in drug trafficking but that it has formed active partnerships with the ethnic groups who already dominate the trade.<sup>336</sup> In fact, some believe that the business of drug production and trafficking in Burma is what has kept its economy afloat, a fact of which the regime may be all too aware.<sup>337</sup>

Although the US lacks direct evidence that senior Burmese officials are involved in the drug trade,<sup>338</sup> the International Narcotics Control Strategy Report of 2002 speculated that the regime is indeed directly involved. This view was based on two factors: the "prominent role" notorious traffickers play in the country's affairs, and the way large-scale trafficking continues to thrive under the very "intrusive military rule."<sup>339</sup> One academic report published in Australia claims that the regime actually invests in heroin refineries through its contacts with drug lords whom they have allowed to set up "legitimate businesses."<sup>340</sup>

One prime example of a drug trafficker who plays a "prominent role" inside Burma is major drug lord Khun Sa. The US has requested Khun Sa's extradition, not only on charges of drug smuggling but for allegedly ordering the assassination of a US District Attorney.<sup>341</sup> The government both refused this request and neither investigated nor prosecuted him.<sup>342</sup> Khun Sa not only stayed out of prison, but was assisted by the Government of Burma in setting up "legitimate businesses"<sup>343</sup> in Burma, such as bus companies in Shan state.<sup>344</sup> Khun Sa's relationships and friendships with high ranking Burmese officials are well documented.<sup>345</sup> The Khun Sa story is not unusual. Such practices by the government—refraining from prosecuting drug lords, and the close relationships between drug dealers and many officials—make the international community's suspicions quite understandable.

Heroin and ATS are trafficked out of Burma along several specific land routes<sup>346</sup> through India, Thailand, and China, as well as by sea.<sup>347</sup> In the past, 80 percent of Burma's heroin was exported over the Thai border. Since the Government of Thailand launched its no-tolerance policy and cracked down on heroin trafficking, however, this figure has dropped.<sup>348</sup> The heroin trail now leads into China's southern provinces.<sup>349</sup> Nevertheless, Thailand remains part of the Burmese drug route, as a major victim of trafficking in Burmese-manufactured ATS.<sup>350</sup> India has also seen an enormous increase in drug flow

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<sup>335</sup> See *A Failing Grade*, *supra* note 309, at 34.

<sup>336</sup> See generally *A Failing Grade*, *supra* note 309.

<sup>337</sup> See *A Failing Grade*, *supra* note 309, at 66.

<sup>338</sup> See *A Failing Grade*, *supra* note 309, at 105.

<sup>339</sup> International Narcotics Control Strategy Report 2003, *supra* note 312.

<sup>340</sup> Desmond Ball, *Burma and Drugs: The Regime's Complicity in the Global Drug Trade*, Canberra: the Strategic and Defense Studies Centre, Australian National University, Working Paper No. 342, Nov. 20, 1999.

<sup>341</sup> See *A Failing Grade*, *supra* note 309, at 65.

<sup>342</sup> Lt. Col Hla Min, *Political Situation of Myanmar and Its Role in the Region*, Office of Strategic Studies, Ministry of Defense, Union of Myanmar, 22nd Ed, Nov. 18, 1999.

<sup>343</sup> See *id.* Burmese officials in their own words admit to providing drug lords with "financial and other necessary assistance to start a new life in legitimate business." Lt. Col. Hla Min also stated that the United States' method of going after and jailing drug dealers in other countries has not reduced the flow of drugs into its country and therefore is not a good method.

<sup>344</sup> See *Drug Fear Rise As Khun Sa Starts Bus Firm*, BANGKOK POST, Apr. 26, 1996 (referencing Thai fears of Thai officials that Khun Sa would transport heroin in addition to passengers).

<sup>345</sup> See *A Failing Grade*, *supra* note 309 at 104.

<sup>346</sup> *A Failing Grade*, *supra* note 309, at 63. ATS follows different routes than those established by heroin traffickers, using inaccessible jungle routes instead.

<sup>347</sup> See GAO Drug Control Report, *supra* note 316; see also Laurie Garrett, *HIV and National Security: Where are the Links?*, Council on Foreign Relations Report, 2005, at 38 (hereinafter CFR HIV/AIDS Report) presenting a table depicting the drug trafficking routes from Burma—routes that correlate with the spread of HIV/AIDS.

<sup>348</sup> See GAO Drug Control Report, *supra* note 316.

<sup>349</sup> International Narcotics Control Strategy Report 2005, *supra* note 310.

<sup>350</sup> *Id.*

from Burma over the shared border.<sup>351</sup> This increase is in itself suspicious: because the Indian government maintains such tight control over this border, many in the international community suspect there may be military complicity in the burgeoning flow of drugs.<sup>352</sup> These drugs eventually reach consumers in Southeast Asia as well as the West.<sup>353</sup> Although it is not clear how much Burmese-manufactured ATS<sup>354</sup> and heroin<sup>355</sup> actually ends up on the streets of Western countries today, there is no question that a certain percentage does. Regardless of the volume, the effects from drug trafficking generate an instability that poses a threat to the world generally.

The majority of Burma's ATS pills and a significant supply of its heroin have found a strong market in Asia. Furthermore, Burmese-made heroin, at the very least, is reaching a growing consumer market within Burma. Although Government of Burma records show that there are approximately 90,000 addicts in Burma, the United Nations and other non-governmental organizations believe that the number is closer to 400,000 or 500,000.<sup>356</sup> In response to this inconsistency, it is important to note that poor surveillance and information collection procedures in Burma make it impossible to know the real situation. Certainly, the statistics presented by the Government of Burma are considerably understated.<sup>357</sup> The only known reliable data on the population prevalence of substance use and heroin addiction in Burma was collected in cooperation with the UN Office of Drug Control in 1995, but that data was never released.<sup>358</sup>

#### *The Contribution of Burma's Drug Trade to an International Health Crisis*

Although the narcotics problem in Burma continues to be of significant concern, the spread of HIV/AIDS in the region is even more alarming. The shift from smoking opiates to injecting heroin intravenously with shared needles has resulted in the spread of HIV/AIDS in southwest China, northeast India, and northern Thailand—the areas most affected by Burmese heroin exports.<sup>359</sup> In those areas, addicts find it almost impossible to obtain a fresh supply of needles.<sup>360</sup> This forces them to share the same needle, often throughout villages.<sup>361</sup> The resultant spiraling HIV infection rate has appeared in Burma and is penetrating neighboring countries along Burma's drug routes, particularly China and India.<sup>362</sup> Rates of shared injecting equipment remain as high as 50 percent in the Southeast Asia region.<sup>363</sup> This has been recognized as a serious issue for a long time, because injecting drug use populations were the first to spread the HIV epidemic.<sup>364</sup>

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<sup>351</sup> *A Failing Grade*, *supra* note 309, at 57.

<sup>352</sup> *Id.*

<sup>353</sup> DEA Report, *supra* note 307.

<sup>354</sup> Burmese made ATS has appeared in the U.S. markets in recent years. *See Yaba, New Form of Meth, Now Appearing in U.S.*, DEA Update, Vol. 2, Issue 1, Feb. 13, 2003.

<sup>355</sup> Traditionally, the U.S. received far more of its heroin supply from this region. In recent years, however, most of the U.S. heroin supply enters the country from South America owing to South America's burgeoning heroin production. *See A Failing Grade*, *supra* note 309 at 58.

<sup>356</sup> DEA Report, *supra* note 307.

<sup>357</sup> *Drugs and HIV/AIDS in Southeast Asia, Reducing HIV Vulnerability from Drug Abuse*, United Nations Office of Drugs and Crime, AD/RAS/02/G22, 2004, at 33 (hereinafter UNODC Drugs and HIV/AIDS Report).

<sup>358</sup> Dr. Christopher Beyrer, *Assessing the Magnitude of the HIV/AIDS Epidemic in Burma*, JOURNAL OF AIDS, Vol. 32, 2003, at 311-317. It has been suggested that the reason it was never released was because the government was unhappy with the high rates of addiction the study reportedly uncovered.

<sup>359</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>360</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>361</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>362</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>363</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>364</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

## **5. HIV/AIDS**

Although Africa has seen the most dramatic rates of HIV/AIDS infection, the epicenter of the virus has “shifted emphatically to Asia.”<sup>365</sup> Indeed, it is Burma that has contributed significantly to the spread of this pandemic.

As a result of needle sharing among drug users in Burma, injecting drug users have rapidly “spread the epidemic among themselves, and further to their sexual partners and into the general population at large.”<sup>366</sup> UNAIDS estimates the current rate of HIV infection in Burma is around 1.3 percent, while another recent survey estimates it to be closer to 3.46 percent.<sup>367</sup> In reality, the rates are likely much higher. Because it is impossible to accurately survey the situation, there is no discernable way to determine the actual rate. What is determinable, however, is that the rates are increasing very quickly.<sup>368</sup> The rate of HIV infection among injecting drug user’s in Burma is “alarming” and is thought to be as high as 96 percent in some areas.<sup>369</sup>

Burma is not the only country affected by the spread of the virus. Sub-type C of HIV-1 originating in Burma has extended past Burma’s borders into Thailand, China, and throughout the region.<sup>370</sup> Its spread is facilitated by the trafficking of heroin from Burma. In fact, a direct correlation exists between the drug trafficking routes and the “distribution of HIV/AIDS.”<sup>371</sup> While en route, drug traffickers stop in villages and dispense heroin along with infected needles.<sup>372</sup> Recent HIV outbreaks coincide with the opening of new heroin markets and distribution networks.<sup>373</sup> For example, in India, the “Burma strain” is popping up along newly-established trafficking routes into the Indian states bordering Burma.<sup>374</sup> Today, four-fifths of China’s HIV/AIDS cases can be traced back to Burma along well-established mountain trafficking routes.<sup>375</sup>

While the root of HIV in the region can be traced along the heroin trade routes emanating from Burma, other causes contribute to the spread. For example, in Burma, rape of village women by infected Tatmadaw soldiers is also contributing to the HIV/AIDS epidemic in Burmese villages.<sup>376</sup> The regime has also implemented some HIV prevention measures, but they are directed to officers and have little effect on the growing rate of infection in the military generally.<sup>377</sup>

Similarly, the region’s flourishing sex trade provides an even more substantial vehicle for the spread of the virus.<sup>378</sup> Drug users in villages along the trafficking routes initially spread the virus to local

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<sup>365</sup> *HIV/AIDS and Development in Asia and the Pacific, HIV/AIDS: a Major International Security Issue*, Asia Pacific Ministerial Meeting, Australian Government’s Overseas Aid Program, 1, Oct. 9-10 2001 (hereinafter Asia Pacific Ministerial Meeting).

<sup>366</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>367</sup> *Joint Programme for HIV/AIDS: Myanmar 2003-2005*, United Nations Expanded Theme Group on HIV/AIDS, UNAIDS, revised Apr. 2004 (hereinafter UNAIDS Report); *see also A Failing Grade*, *supra* note 309, at 118.

<sup>368</sup> *See also A Failing Grade*, *supra* note 309, at 117.

<sup>369</sup> Edited by Mark Barrett, *Reducing HIV Vulnerability from Drug Abuse: Drugs and HIV in South East Asia*, UN Office of Drug and Crime, AD/RAS/02/G22, Feb. 2004 (hereinafter UNODC HIV Report).

<sup>370</sup> *See id.*, at 9.

<sup>371</sup> *See id.*, at 9.

<sup>372</sup> *See id.*, at 9.

<sup>373</sup> *See id.*, at 9.

<sup>374</sup> *A Failing Grade*, *supra* note 309, at 57.

<sup>375</sup> UNODC HIV Report, *supra* note 369, at 9.

<sup>376</sup> *See* CFR HIV-AIDS Report, *supra* note 347. Rape by soldiers in conflict areas greatly increases the spread of HIV. *See also* UNODC HIV Report, *supra* note 369 at 9. The rate of infection in government soldiers is said to be as high as 8 percent.

<sup>377</sup> *Myanmar: Update on HIV/AIDS Policy*, Asia Briefing, International Crisis Group, Dec. 16, 2004 (hereinafter ICG Report).

<sup>378</sup> Asia Pacific Ministerial Meeting, *supra* note 365.

prostitutes, who are often very young girls. From this point the virus spreads into families and communities.<sup>379</sup>

The end result of activities that began in Burma, with the government's willful inaction and active complicity, has resulted in the penetration of HIV/AIDS into its neighboring countries. The situation born in Burma is quickly growing out of control and impacting the region. Burma's prosperous drug trade is having a deadly impact on the Burmese people and the peoples of that region.

In response to the HIV/AIDS crisis generally, the Security Council adopted a "landmark"<sup>380</sup> resolution in 2000 seeking to call the world's attention to the AIDS pandemic.<sup>381</sup> The Security Council recognized that the pandemic is "exacerbated by conditions of violence and instability."<sup>382</sup> The Council further considered the increased threat that an unchecked pandemic would pose to the security and stability of the world.<sup>383</sup> To most effectively control the spread of HIV/AIDS, the Security Council stressed the necessity for coordinated efforts among international and domestic organizations. Unless a "coordinated response" is initiated, UNAIDS officials acknowledged, then the disease has the "genuine potential" to grow out of control.<sup>384</sup> Similarly, UNODC has completed a project, *Reducing HIV Vulnerability from Drug Abuse*, advocating for intersectoral collaboration among governments and aid organizations to integrate work plans that jointly address HIV/AIDS prevention initiatives.<sup>385</sup>

In addition, the international community set up the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) as an independent organization, with a grant of \$98.4 million specifically earmarked for Burma.<sup>386</sup> This was a bold move by the international community. Its aim was to stop the spread of HIV/AIDS, inside and from Burma. According to the International Crisis Group in 2004, the "last two years had been a time of rapid change in the governmental response to the epidemic . . . and new leadership on the issue has meant improved programming and better use of staff."<sup>387</sup> The principal organization that would implement Fund programs in Burma was the United Nations Development Program (UNDP).

Unfortunately, initial optimism about the Fund program came to a quick end. The Government of Burma changed its attitude toward foreign assistance rather quickly. Officials began making it very difficult for aid workers to implement Global Fund assistance in an effective and non-discriminatory manner.<sup>388</sup> Moreover, the government instituted new procedures that also threw up serious roadblocks to the progress of the program.

In an unprecedented step, the Global Fund announced in August 2005 that it would terminate its assistance to Burma.<sup>389</sup> The official reason for the termination: the regime's newly established clearance procedures which greatly restricted UNDP in its ability to implement Fund programs.<sup>390</sup> According to the Fund's spokesperson, the Burmese authorities made it "impossible" for them to continue with their

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<sup>379</sup> Asia Pacific Ministerial Meeting, *supra* note 365.

<sup>380</sup> *UNAIDS Briefs Security Council on Progress of Historic Aids and Security Resolution*, UNAIDS, Press Release, Jul. 18, 2005.

<sup>381</sup> UN Security Council, Resolution 1308, S/RES/1308, Jul. 17, 2000.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> UNAIDS Report, *supra* note 367.

<sup>385</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>386</sup> *Global Fund Terminates Burma Grants*, BBC NEWS, Aug. 19, 2005.

<sup>387</sup> ICG Report, *supra* note 377.

<sup>388</sup> *Id.*

<sup>389</sup> Global Fund to Fight AIDS, Tuberculosis and Malaria, Message from the Secretariat, Aug. 19, 2005.

<sup>390</sup> *Id.*

activities and programs in a “reasonable way.”<sup>391</sup> Even worse, “the Government of Burma is not allowing international organizations . . . to actually do the work and reach the people in Burma.”<sup>392</sup> As a result, the regime has failed to “cooperate” with international organizations attempting to “create and execute policies for HIV/AIDS prevention” as requested by the Security Council.<sup>393</sup>

The regime on its own spends very little on HIV/AIDS programs. This is just part of the overall poor picture of health care in Burma. Internally, the regime’s spending on health and education is “perilously low” and the lack of funding is further exacerbated by the regime’s “gross mismanagement” of the economy.<sup>394</sup> In 2004, the entire HIV/AIDS budget for the national program of the Government of Burma was \$22,000, one of the lowest levels of national spending on HIV/AIDS in the world.<sup>395</sup> It can be confidently said that little progress will be made against the spread of Burma’s HIV/AIDS epidemic without international assistance. Unfortunately, to impact the epidemic in Burma, international assistance must be coupled with cooperative efforts by the regime. In light of recent events and in consideration of the regime’s behavior over the years, such cooperation will not come easy.

## **6. Child Soldiers**

The recruitment of children as young as 11 years old into the Tatmadaw<sup>396</sup> is a pervasive problem in Burma.<sup>397</sup> Burma has more child soldiers than any other country in the world.<sup>398</sup> In 2002, an estimated 70,000 of Burma’s 350,000 active duty soldiers were children.<sup>399</sup> The army often captures boys in public places, such as train and bus stations and markets, and coerces them to enlist in the army with threats of imprisonment.<sup>400</sup> Following a torturous training period in the Su Saun Yay recruit holding camps, where boys frequently die from illness and beatings,<sup>401</sup> the child soldiers are forced to carry out human rights abuses and engage in battles against armed ethnic opposition groups.<sup>402</sup>

Even after the children complete training, they are “brutalized by their commanders . . . Their commanders beat them for little or no reason, steal their pay and their rations, and then send them out to the villages to steal their own food and round up villagers for forced labor.”<sup>403</sup> The army refuses to allow these children to have any contact with their families or to take leave during their first five years in the army.<sup>404</sup> Child soldiers who are able to escape the army still face harsh consequences: refugee camps in

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<sup>391</sup> Global Fund Terminates Burma Grants, *supra* note 386.

<sup>392</sup> *Id.*

<sup>393</sup> UN Security Council Resolution 1308, *supra* note 381.

<sup>394</sup> ICG Report, *supra* note 377.

<sup>395</sup> ICG Report, *supra* note 377, stating the government has only spent a total of tens of thousands of dollars.

<sup>396</sup> Kevin Heppner, *My Gun Was As Tall As Me: Child Soldiers in Burma*, Human Rights Watch, 2002, at 2 (hereinafter *My Gun Was As Tall As Me*).

<sup>397</sup> See *Burma: Demobilize Child Soldiers*, Human Rights Watch, Jun. 4, 2004, available at [http://hrw.org/english/docs/2004/06/04/burma8734\\_txt.htm](http://hrw.org/english/docs/2004/06/04/burma8734_txt.htm) (hereinafter *Demobilize Child Soldiers* (noting that armed opposition groups also recruit child soldiers, but to a lesser extent than the national army)).

<sup>398</sup> See *Demobilize Child Soldiers*, *supra* note 397 (explaining that Human Rights Watch determined the number of child soldiers in Burma during an investigation in 2002, which included interviews of former government soldiers).

<sup>399</sup> *My Gun Was As Tall As Me*, *supra* note 396, at 3.

<sup>400</sup> See *id.* (stating that recruiters are rewarded with money and bags of rice for each soldier they enlist). Police seeking to recruit child soldiers often stop children to check their ID cards, even though ID cards are not given to children. *My Gun Was As Tall As Me*, *supra* note 396, at 1. When the children are unable to produce ID cards, they are taken to the police station and given the choice of enlisting in the army or spending several years in prison. *Id.*

<sup>401</sup> See *My Gun Was As Tall As Me*, *supra* note 396, at 2 (during training, the children are “subject to beatings and systematic humiliation” and those attempting to escape are beaten or placed in crowded holding cells).

<sup>402</sup> See *Demobilize Child Soldiers*, *supra* note 397 (providing that the child soldiers often are required to “round[] up villagers for forced labor, burn[] villages, and carry[] out executions”).

<sup>403</sup> *My Gun Was As Tall As Me*, *supra* note 396, at 6.

<sup>404</sup> See *id.* (“The isolation from their families, the brutality of their officers and the abuses they are forced to commit against civilians make many child soldiers desperate to escape.”).

other countries are closed to Burma army deserters, families of deserters are harassed, and deserters who are caught by the army are forced to return.<sup>405</sup> Some child soldiers see suicide as their only option.<sup>406</sup>

Although 11 years appears to be the youngest age at which children are pressed into the army, children below this age are also recruited and detained until they are that age.<sup>407</sup> This takes place through the “Ye Nyunt” (“Brave Sprouts”) training system aimed specifically at younger children.<sup>408</sup> Under this system, army battalions keep 50 to 250 boys at each of 50 to 100 different battalion bases (estimates of the total range from 2,500 to 25,000 boys at any one time) throughout Burma. The boys wear military uniforms and begin weapons training at age seven.<sup>409</sup> A Human Rights Watch interview with one boy revealed that children as young as four years old are held in these camps.<sup>410</sup> Although the system originally accepted orphaned or displaced boys, it now has resorted to kidnapping and forcing boys into the camps.<sup>411</sup> The boys are denied contact with the outside world and are beaten regularly, particularly for crying.<sup>412</sup>

Although the government denies charges that the national army “systematic[ally] recruit[s]” children, it has conceded that the use of child soldiers is an “issue.”<sup>413</sup> To prompt countries like Burma to take steps to end the use of child soldiers, the Security Council designated the recruitment or use of children in armed conflict as an issue of transnational concern when it adopted, for example, Resolution 1460.<sup>414</sup> Resolution 1460 calls upon all concerned parties to end the use of child soldiers, in violation of international law and expresses the Security Council’s support for the enforcement of the Optional Protocol to the Convention on the Rights of the Child.<sup>415</sup> Resolution 1460 also asked the Secretary-General to submit a report on the progress of the struggle to end the use of child soldiers. In that report, the Secretary-General concluded that “children continue to be forcibly recruited by government armed forces and armed groups. The United Nations has documented cases of child soldiers fleeing Myanmar into Thailand.”<sup>416</sup>

Burma’s continued use of child soldiers not only contravenes Resolution 1460 (and most recently adopted Resolution 1612<sup>417</sup>), it also violates Burma’s obligations as a signatory to the Convention on the Rights of the Child.<sup>418</sup> Article 38 of the Convention requires the Government of Burma to “take all feasible measures to ensure that persons who have not attained the age of fifteen do not take a direct part

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<sup>405</sup> See *id.* at 7 (noting that children who escape and flee to other countries often are trafficked into bonded labor or have no option other than to perform illegal work).

<sup>406</sup> See *id.*, at 6.

<sup>407</sup> See *id.*, at 4 (relaying the story of a boy who was kidnapped at 10 and forced to work as a servant for 3 years before becoming a soldier).

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> See *id.* (stating that the children at the camp where the boy was detained ranged in age from 4 to 16 years old).

<sup>411</sup> *Id.*

<sup>412</sup> See *id.* at 5 (explaining that the entire group of boys held at a battalion base are forced to beat any child who tries to escape).

<sup>413</sup> See Human Rights Watch Report, *supra* note 60 (noting that “[l]argely as a result of an October 2003 report to the United Nations Security Council by Secretary-General Kofi Annan, the government formed a high-level ‘Committee to Prevent the Recruitment of Child Soldiers,’ and announced that a task force was being formed to ensure inspections for underage recruitment”).

<sup>414</sup> See UN Security Council, Resolution 1460, S/Res/1460, Jan. 30, 2003 (hereinafter S.C. Res. 1460) (stating that the Security Council’s responsibility for maintaining international peace and security includes a “commitment to address the widespread impact of armed conflict on children”).

<sup>415</sup> See *id.* (noting that the Rome Statute of the International Criminal Court categorizes as a war crime the use of children under the age of 15 as soldiers in national armed forces or as active participants in hostilities).

<sup>416</sup> *Children and Armed Conflict*, Report of the Secretary-General, United Nations, A/58/546-S/2003/1053, 2003.

<sup>417</sup> See UN Security Council, Resolution 1612, S/Res/1612, Jul. 26, 2005.

<sup>418</sup> See Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties*, United Nations, Jun. 9, 2004 (noting that Burma signed the Convention on the Rights of the Child on Aug. 14, 1991).

in hostilities” and to “refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”<sup>419</sup> The Committee on the Rights of the Child has expressed its grave concern over the Burmese army’s continued recruitment of children under the age of 15 and has recommended a variety of actions the government should take to conform with its Convention obligations.<sup>420</sup>

## ***B. International Promotion of National Reconciliation in Burma***

The Government of Burma is a threat to international peace and security; there is overwhelming evidence that its ruling party, the SPDC, is violating the human rights of the Burmese people; and the regime has refused to engage in tripartite dialogue with the NLD and ethnic groups. The responses of many foreign governments and coalitions of governments have ranged from quiet support for change to the implementation of sanctions targeted against the regime.

### **1. United Nations**

The United Nations has spent a considerable amount of effort and resources trying to promote political, economic, and social change in Burma. Its attempts have largely failed due to the intransigence of Burma’s government. The Secretary-General’s office, UN General Assembly, UN Commission on Human Rights, Committee on Torture, Committee on the Elimination of All Forms of Discrimination Against Women, Working Group on Arbitrary Detention, and Economic and Social Council have all worked in various capacities toward achieving progress in Burma. The primary goal of UN action in recent years has been to facilitate national reconciliation in Burma through the promotion of tripartite dialogue between the SPDC, NLD, and the country’s ethnic groups. The SPDC, however, has dismissed the efforts of the UN system by refusing to comply with even the most minimum demands.

Both the UN General Assembly and the Commission on Human Rights have adopted annual resolutions (in the last fourteen and thirteen years, respectively) expressing their “grave concern” at the “ongoing systematic violation of human rights” in Burma.<sup>421</sup> Consistently, both bodies have asked that the SPDC cease harassment of NLD members and other political opposition groups and to engage in tripartite dialogue with elected NLD members and ethnic groups so that the process of democratization and reconciliation can move forward.<sup>422</sup> These resolutions have also called for the immediate release of Aung San Suu Kyi, a request that has been repeated steadily and urgently since 1990.<sup>423</sup>

In order to carry out initiatives and maintain an accurate understanding of the circumstances in Burma, the General Assembly authorized the Secretary-General appointed a Special Envoy and the UN Commission on Human Rights appointed a Special Rapporteur, each to investigate and report on the situation in Burma and facilitate dialogue.<sup>424</sup>

Paulo Pinheiro, an accomplished and respected diplomat who currently serves as the UN Special Rapporteur on Human Rights in Myanmar, has had an especially tumultuous history with the regime.

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<sup>419</sup> See *Convention on the Rights of the Child*, G.A. Res. 44/25, UN GAOR Supp. (No. 49), A/44/49, 1989, entered into force Sept. 2, 1990 (providing that when children between the ages of 15 and 18 years old are recruited, the government must attempt to “give priority” to the oldest children).

<sup>420</sup> See *Concluding Observations of the Committee on the Rights of the Child: Myanmar*, CRC/C/15/Add.69, 2004 (recommending that the State party take such actions as “[s]trengthen[ing] its efforts to end the armed conflict and to ensure that the protection and promotion of children’s rights are given due consideration in any peace negotiations[.]” and “[p]rioritiz[ing] the demobilization and reintegration of all combatants under 18”).

<sup>421</sup> See, e.g., 2005 UN Commission Resolution, *supra* note 210; UN General Assembly, Situation of Human Rights in Myanmar, A/RES/59/263, Dec. 23, 2004, adopted unanimously (hereinafter 2005 UN General Assembly Resolution).

<sup>422</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>423</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>424</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

Traditionally, his style of engagement has been a “low-profile, gentle-nudging approach.”<sup>425</sup> Despite optimistic statements in the beginning of his appointment in 2000 that some change would be forthcoming in the next “2-4 years,” there has been no lasting progress and very little dialogue.<sup>426</sup> Pinheiro’s trips to Burma have been met with a lack of engagement or interest by the regime, rendering his attempts to work with the government futile. For example, although Pinheiro visited Burma numerous times, only rarely did former Prime Minister Than Shwe agree to meet with him.<sup>427</sup> Pinheiro’s April 2003 trip ended abruptly after he discovered listening devices while he was interviewing prisoners at Insein prison near Rangoon.<sup>428</sup> Since November 2003, the regime has completely excluded Pinheiro from the country despite requests for his entry by both Pinheiro himself and the Commission on Human Rights.<sup>429</sup> Although Pinheiro has been barred from visiting Burma, however, he still attempts to carry out his role as Special Rapporteur.<sup>430</sup>

Despite his exclusion, Pinheiro generated a report for the Commission on Human Rights in 2004 stating that “a credible process of national reconciliation. . . is not possible without. . . the early release of all political prisoners and the relaxation of restrictions which continue to hamper the ability of political parties . . . to operate.”<sup>431</sup> He ultimately concluded that the human rights situation in Burma had not only remained unchanged, but “may have even worsened.”<sup>432</sup>

The Secretary-General, in his most recent report, made similar statements, asserting that the expectations of the United Nations remain unfulfilled.<sup>433</sup> This situation has been compounded by the SPDC’s exclusion of the Secretary-General’s Special Envoy on Myanmar, Razali Ismail, who has been kept out of Burma since March 2004.<sup>434</sup> Such actions, along with the Burmese government’s refusal to communicate, have led the Secretary-General to declare that the “present situation casts serious doubt on the prospects for the United Nations to play an effective role as a facilitator in furtherance of the relevant resolutions of the General Assembly.”<sup>435</sup>

As outlined above, UN attempts to engage largely have been ignored and thwarted by the SPDC. The Government of Burma continues to reject all assertions of human rights abuses and remains very resistant to UN efforts. Many believe that given the regime’s history of non-cooperation, few tangible results will be achieved by continuing along the same unsuccessful course of action already taken by non-authoritative bodies. UN efforts to date have been based on unenforceable mandates and have, as a result, been unable to produce any reform.

Prompted by its firm commitment to eradicating forced labor, the ILO has carried out a more vigorous and robust effort in obtaining compliance with its requests. As outlined previously, ILO’s threats to take action against the regime have given it the ability to implement policies in Burma with

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<sup>425</sup> *Ready, Aim, Sanctions*, Alternative ASEAN Network on Burma, Nov. 2003, at 47 (hereinafter *Ready, Aim, Sanctions*).

<sup>426</sup> *Ready, Aim, Sanctions*, *supra* note 425 at 47.

<sup>427</sup> *Ready, Aim, Sanctions*, *supra* note 425 at 47. When the men did meet, little was achieved given the circumstances. For example on one previous trip, the Special Rapporteur was only able to speak with the Prime Minister for only fifteen minutes.

<sup>428</sup> *Ready, Aim, Sanctions*, *supra* note 425 at 49.

<sup>429</sup> *Ready, Aim, Sanctions*, *supra* note 425 at 47.

<sup>430</sup> *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, Situation of human rights in Burma, Report by the Special Rapporteur, Paulo Sergio Pinheiro, Commission on Human Rights, Economic and Social Council, United Nation, Dec. 2, 2004 (hereinafter 2004 Special Rapporteur Report).

<sup>431</sup> *Conditions in Burma and U.S. Policy Toward Burma for the Period September 28, 2004 – March 27, 2005*, Bureau of East Asian and Pacific Affairs, Mar. 29, 2005 (hereinafter *Conditions in Burma Report*).

<sup>432</sup> *Conditions in Burma Report*, *supra* note 431.

<sup>433</sup> *Questions of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, Report of the Secretary-General, Economic and Social Council, United Nations, Mar. 7, 2005.

<sup>434</sup> *Condition in Burma Report*, *supra* note 431. Special Envoy Razali Ismail has continued efforts outside of Burma to encourage dialogue between the NLD and the SPDC.

<sup>435</sup> *Id.*

more success than any other body, including the General Assembly and the Commission on Human Rights.<sup>436</sup>

Many view the example set by the ILO as evidence that the UN, if it were to act with binding and forceful authority through the Security Council, could produce positive reform and ultimately enable democratization in Burma.<sup>437</sup>

## **2. ASEAN**

The Association of Southeast Asian Nations (ASEAN)<sup>438</sup> originally opted for a policy of “constructive engagement” based on the ASEAN charter, which calls for states not to interfere in the internal affairs of its member states.<sup>439</sup> Recently, however, some ASEAN member states have publicly declared their discontent over the situation in Burma, particularly the damage it is inflicting on ASEAN’s reputation and regional stability.

Burma joined ASEAN in 1997. Its inclusion was controversial and criticized by certain members of the international community. ASEAN members defended the decision to allow Burma to enter on the grounds that, as a member of ASEAN, Burma would be subject to member states’ influence and would be led by their good examples. Malaysian Prime Minister Mahathir Mohammed said at the time, “if [Burma] is outside, it is free to behave like a rogue or a pariah, while if it is inside, it would be subject to certain norms of behavior.”<sup>440</sup> However well-intentioned this belief, however, “no progress”<sup>441</sup> has been realized from Burma’s inclusion into ASEAN. In fact, Burma has never given any “positive sign that it can change.”<sup>442</sup>

In 2003, Thailand’s prime minister pledged to do “whatever possible to facilitate Burmese national reconciliation and a return to democracy.”<sup>443</sup> ASEAN also took the “unprecedented step” of urging Burma to release Daw Aung San Suu Kyi.<sup>444</sup> And the Malaysian Prime Minister made statements alluding to Burma’s possible expulsion from ASEAN given concern over the damage that the regime was doing to ASEAN’s image.<sup>445</sup>

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<sup>436</sup> *Ready, Aim, Sanction, supra* note 425; *see also Sanctions Revisited*, IRRAWADDY MAGAZINE, May 2001, quoting Myanmar Chamber of Commerce and Industry, “with the imposition of restrictions and sanctions, the international trading and business activities in Myanmar, of which we form the cornerstone, will be crippled and widespread national economic decline will occur.” As a result, the SPDC allowed an ILO country liaison to be established for Burma.

<sup>437</sup> *Ready, Aim, Sanctions, supra* note 425.

<sup>438</sup> ASEAN members: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. While China, Japan, and South Korea are not members, they actively participate and join ASEAN’s summit every year. As a result, ASEAN is often referred to as ASEAN-plus-three. *See Koizumi to Leave for ASEAN summit in Bali*, ASIAN POLITICAL NEWS, Oct. 6, 2003.

<sup>439</sup> *See Phar Kim Beng, Myanmar: ASEAN’s Thorn in the Flesh*, ASIA TIMES ONLINE, Jul. 25, 2005. This policy originated from Thailand and is the official policy of ASEAN.

<sup>440</sup> *ASEAN Stands Firm on Burma’s Entry Despite Western Pressure*, AGENCE FRANCE PRESSE, May 1, 1997.

<sup>441</sup> Amy Kazim, *Asean Leaders Under Pressure Over Burma*, FINANCIAL TIMES OF LONDON, Jun. 15, 2003.

<sup>442</sup> Carlos H. Conde, *At Retreat for ASEAN, Unease over Myanmar*, INTERNATIONAL HERALD TRIBUNE, Apr. 12, 2005.

<sup>443</sup> Kazim, *Asean Leaders Under Pressure Over Burma, supra* note.

<sup>444</sup> Chairman’s Statement, Tenth Meeting of ASEAN Regional Forum, ASEAN, Jun. 18, 2003. “Noting the importance of strengthening democracy as a fundamental element of regional security, the Ministers were briefed about the current situation in Myanmar. They urged Myanmar to resume its efforts of national reconciliation and dialogue among all parties concerned leading to a peaceful transition to democracy. They welcomed the assurances given by Myanmar that the measures taken were temporary and looked forward to the early lifting restrictions placed on Daw Aung San Suu Kyi and the NLD members. They affirmed their efforts of the United Nations Secretary-General’s Special Representative Tan Sri Razali Ismail to assist in the regard.” Hiro Katsumata, *Why ASEAN Criticized Myanmar*, ASIA TIMES ONLINE, Jun. 25, 2003.

<sup>445</sup> Phar Kim Beng, *supra* note 439.

The following year, UN Secretary-General Kofi Annan told ASEAN leaders that it was the responsibility of countries in the region to help “accelerate the process of democratization and national reconciliation in Myanmar, beginning with the release of Daw Suu Kyi.”<sup>446</sup> Thai officials assured Annan that they had “a special method” designed to bring about rapid political progress in Burma.<sup>447</sup> However, no such progress has been forthcoming. Nevertheless, while Thailand has said little about Burma’s human rights situation, Thai officials have openly criticized Burma’s failure to curb the flood of drugs into Thailand. Thai Prime Minister Thaksin Shinawatra accused Burma of not being a good neighbor, stating that “a neighbor which lets its domestic drugs production ruin the future of its neighbor is not a good friendly neighbor.”<sup>448</sup> More recently, the Thai ambassador to Washington, Kasit Piromya, clearly acknowledged these cross-border problems when he explained that “refugees have fled to Thailand . . . bringing with them disease and, in some cases, drugs and other smuggled goods.”<sup>449</sup>

Every state that is a member of ASEAN receives a turn chairing the organization. Burma’s turn was scheduled for 2006, and many ASEAN members feared the prospect. Despite this fear, ASEAN claims to have allowed Burma to decide for itself whether it would take the position.<sup>450</sup> Burma, to the members’ relief, declined the position stating that it wished to “focus on the ongoing national reconciliation and democratization process.”<sup>451</sup> It is a sign of the frustration within ASEAN itself that Burma was openly asked whether it wished to chair the organization—a move that may not appear significant to a lay audience but that is regarded in the international diplomatic community as groundbreaking and decisive. Thai Foreign Minister Kantathi Suphamongkhon stated that Burma’s decision was a voluntary one, yet was made in “very close” consultation with fellow ASEAN colleagues.<sup>452</sup> Particularly concerned with ASEAN’s credibility, member states such as Singapore, the Philippines, Indonesia, and Malaysia are reported to have pressured Burma into making the choice to decline the seat.<sup>453</sup> Malaysian Foreign Minister Syed Hamid Albar told reporters that “it’s our duty to inform [the Government of Burma] of the feelings of each ASEAN country.”<sup>454</sup> Just days before the SPDC was to inform ASEAN of its decision, Albar said that “we don’t want to tell [Burma] they must get out, or that they must miss their turn, but they know what they need to do.”<sup>455</sup> Singapore had been particularly outspoken, publicly expressing its fear that ASEAN was “in danger . . . of being dragged into [Burma’s] internal politics.”<sup>456</sup> Singapore’s Foreign Minister George Yeo even expressed sympathy for the Burmese people who “bear the consequences” of the conflict.<sup>457</sup> The Philippines, also expressing “grave concern” over human rights in Burma, remained resolute in its call for the country to yield the chairmanship until it delivered its promised democratic reforms.<sup>458</sup> Indonesia’s parliament had actually

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<sup>446</sup> Edith M. Lederer, *Annan Underscores Responsibility of Southeast Asian Nations to Accelerate Democracy in Myanmar*, ASSOCIATED PRESS, Jul. 16, 2004.

<sup>447</sup> *Id.*

<sup>448</sup> *Thaksin Slams Burma: ‘Not a Good Neighbor,’* FINANCIAL TIMES, Aug. 23, 2003.

<sup>449</sup> *Thai Ambassador Urges Softer U.S. Stance Towards Burma*, ASSOCIATED PRESS, Sept. 5, 2005.

<sup>450</sup> *Myanmar to Skip 2006 ASEAN Chairmanship*, JAPAN ECONOMIC NEWSWIRE PLUS, Jul. 26, 2005.

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> Amy Kazim, *Rangoon Opts Out of ASEAN leadership*, FINANCIAL TIMES, Jul. 27, 2005.

<sup>454</sup> Ganjanakhundee, Supalak, *ASEAN Chair: Members Express Concern*, NATION (Thailand), Jun. 10, 2005.

<sup>455</sup> *Malaysia Hopes Myanmar Will Settle ASEAN Chair Issue Next Week*, AGENCE FRANCE PRESSE, Jul. 19, 2005.

<sup>456</sup> Jason Gutierrez, *ASEAN FM’s Fail to Agree on Myanmar During Retreat in Philippines*, AGENCE FRANCE PRESSE, Apr. 11, 2005.

<sup>457</sup> *Id.*

<sup>458</sup> *Jim Gomez, Philippine Government Remains Gravely Concerned Over Human Rights Conditions in Myanmar*, ASSOCIATED PRESS, Jun. 1, 2005. Philippine’s Foreign Secretary called for the Government of Burma to release Aung San Suu Kyi, craft a new constitution, and allow the UN Special Envoy to visit.

issued a resolution stating that if Burma assumed the role of chair without some “reform being implemented,” Indonesia would boycott meetings.<sup>459</sup>

Although the potential crisis of Burma’s chairmanship has ended, some member states, such as Singapore, have not wavered in their criticism of the SPDC. Recently, Singapore Minister Mentor Lee Kuan Yew stressed that Burma cannot stay “frozen in time” forever. “To stay frozen in time means they are building up problems for themselves, and those problems will overflow into ASEAN.”<sup>460</sup>

### *China, India, and Japan*

China, Burma’s largest supporter and trade partner, generally refrains from public criticism of Burma.<sup>461</sup> China, however, has not been entirely quiet on the subject. On occasion, Chinese officials have expressed their “hope that the process of national reconciliation and democracy in Myanmar will move forward.”<sup>462</sup> Privately, some officials have even suggested that the regime’s “lack of legitimacy will lead to political instability and could pose a major threat to regional stability in the future.”<sup>463</sup> Recently, there has been increased suspicion that Chinese officials are “losing patience” with Burma over the rising drug crisis in China.<sup>464</sup> Despite China’s lack of public engagement, some observers believe that China does privately attempt to encourage reform through discussions with Burma’s government officials.<sup>465</sup>

India, a more recent supporter and ally of Burma as a result of its burgeoning trade relationship, has become more vocal in recent years regarding the situation in Burma.<sup>466</sup> In 2003 at the Bangkok Process, a series of meetings for interested governments to discuss Burma, India was the only country that called neither called for Daw Suu Kyi’s release nor for the SPDC to include the NLD in the reform process.<sup>467</sup> Nevertheless, Prime Minister Manmohan Singh declared his interest in the democratization process in Burma as well as the desire for Aung San Suu Kyi’s release to US President George W. Bush during a bilateral meeting in 2004.<sup>468</sup> Shortly thereafter, during Senior General Than Shwe’s state visit to India, both India and Burma issued a joint statement which indicated “[t]he Indian side stressed that it wished to see a stable, peaceful, prosperous and democratic Myanmar and was ready to assist the Government and people of Myanmar on their path to further political and economic progress.”<sup>469</sup>

Japan originally supported Burma’s entry into ASEAN. Japanese officials, however, acknowledged that there was a “situation” in Burma and expressed concern that Burma’s entry in ASEAN should “not provide a smokescreen for oppression in Myanmar.”<sup>470</sup> Eight years after Japan supported

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<sup>459</sup> Gomez, *supra* note 458; See also Bernadette S. Sto. Domingo, Malaysia Wants RP to Head ASEAN, BUSINESS WORLD, Jun. 22, 2005.

<sup>460</sup> Kuan Yew: Myanmar Can’t Stay Frozen, STAR ONLINE, at <http://thestar.com.my/news/story.asp?file=/2005/8/12/asia/11746412&sec=asia>, Aug. 12, 2005.

<sup>461</sup> U.S. Trade Sanctions Report, *supra* note 461.

<sup>462</sup> Myanmar Pledges Democracy, ASSOCIATED PRESS, Oct. 22, 2004.

<sup>463</sup> Larry Jagan, China Support Burma, But Urges Change, INTER-PRESS SERVICE, Aug. 27, 2004 (citing an anonymous Senior Chinese diplomat).

<sup>464</sup> China Losing Patience, WORLD NEWS CONNECTION (NEWSWIRE), May 18, 2005.

<sup>465</sup> U.S. Trade Sanctions Report, *supra* note 461.

<sup>466</sup> See Roundup: Myanmar – India Relations Attain a Step Closer, XINHUA NEWS AGENCY, Mar. 28, 2005.

<sup>467</sup> U.S. Trade Sanctions Report, *supra* note 461.

<sup>468</sup> Background Briefing, Bilateral meetings between Indian Prime Minister Singh and U.S. President Bush, Sept. 22, 2004.

<sup>469</sup> Joint Statement Issued on the Occasion of the State Visit of H.E. Senior General Than Shwe, Chairman of the State Peace and Development Council of Union of Myanmar to India, Government of India, Oct. 29, 2004, at para. 7.

<sup>470</sup> Japan’s Position Regarding the Situation in Myanmar, Minister of Foreign Affairs of Japan, Mar. 1997.

Burma's entrance to ASEAN, Japan's Prime Minister Junichiro Koizumi acknowledged that it would be easier for the "international community to help [Burma] if it can see actual results of democratization."<sup>471</sup>

### **3. European Union**

Although the European Union (EU) has not imposed sanctions nearly as severe as those implemented by the United States, it has, nevertheless, been very vocal in its criticisms of the regime.<sup>472</sup> The EU consistently maintains that "violations of human rights and fundamental freedoms are major international community concerns in Burma."<sup>473</sup>

To that end, the EU established a "Common Position" on Myanmar in 1996 where it affirmed previously imposed EU sanctions such as an arms embargo imposed in 1990, the 1991 suspension of defense co-operation, and the suspension of bilateral aid.<sup>474</sup> In 1996, the European Union also introduced a visa ban on members of the military regime, members of the government, senior military and security officers and members of their families; visits by high-level EU governmental officials to Burma were also suspended.<sup>475</sup> In 2000, 2003, and 2004, due to the regime's "failure to make any significant progress in normalizing of the country and addressing any of the EU's concerns regarding human rights in Burma," the EU increased the sanctions already in place against Burma while reiterating "its desire to establish a meaningful political dialogue with the SPDC."<sup>476</sup> In an attempt to assist some of the more deeply affected Burmese people, the EU gave Burma a total of €19.72 million in 2003 intended to help displaced persons along the Thai border and other "vulnerable groups" inside Burma.<sup>477</sup>

Despite international outcry,<sup>478</sup> in September 2004, EU foreign ministers agreed to allow Burmese diplomats at levels below head of state/government to participate in the Asia Europe Meeting (ASEM).<sup>479</sup> At the time, the ministers threatened that if the regime failed to make improvements, including the release of Aung San Suu Kyi, then sanctions would increase.<sup>480</sup> As a result of the regime's failure to adhere to these requests, the EU again tightened its sanctions by further widening the visa ban to include all officers holding the rank of brigadier general or higher.<sup>481</sup> Additionally, the EU authorized new restrictions to prohibit EU companies from investing in Burmese state-owned enterprises. In April 2005, the Common Position was renewed.<sup>482</sup>

The EU has also called on its members to impose their own legislation. For example, the officials called for states to block assistance to Burma by international financial institutions.<sup>483</sup> Independently, as is discussed below, several states have passed resolutions calling for the Security Council to engage with

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<sup>471</sup> *Japanese PM Urges Burmese Leaders to Promote Democracy*, BBC NEWS, Apr. 22, 2005. Sixty percent of foreign aid the Burmese generals received came from Japan. In 2003 Japan shocked the generals when it suspended aid after the attack and detention of Aung San Suu Kyi in May 2003. See Phar Kim Beng, *supra* note 439. This suspension, however, has not totally endured; the Japanese government does allow for funding on a case-by-case basis. See *Report on U.S. Trade Sanctions Against Burma*, U.S. Department of State, Apr. 28, 2004 (hereinafter U.S. Trade Sanctions Report).

<sup>472</sup> See *EU's relationship with Burma/Myanmar*, European Union, at [http://europa.eu.int/comm/external\\_relations/myanmar/intro/](http://europa.eu.int/comm/external_relations/myanmar/intro/), last visited Sept. 1, 2005 (hereinafter European Union).

<sup>473</sup> European Union, *supra* note 472.

<sup>474</sup> European Union, *supra* note 472.

<sup>475</sup> European Union, *supra* note 472.

<sup>476</sup> European Union, *supra* note 472.

<sup>477</sup> *Burma/Myanmar: Commission Allocates More Than 11 Million Euros For Vulnerable Populations*, European Union, at [http://europa.eu.int/comm/external\\_relations/myanmar/intro/ip04\\_29-12-04.htm](http://europa.eu.int/comm/external_relations/myanmar/intro/ip04_29-12-04.htm), Dec. 29, 2004.

<sup>478</sup> The United States, particularly, strongly urged to EU to oppose this action. See *Conditions in Burma Report*, *supra* note 431.

<sup>479</sup> European Union, *supra* note 472.

<sup>480</sup> European Union, *supra* note 472.

<sup>481</sup> European Union, *supra* note 472.

<sup>482</sup> European Union, *supra* note 472.

<sup>483</sup> See *Conditions in Burma Report*, *supra* note 431.

the SPDC. The United Kingdom has requested that British companies review their investments in Burma.<sup>484</sup> Although this “call” certainly does not rise to the level of a parliamentary ban on investments, the pressure has had an impact. At least eighteen British companies, including British American Tobacco and Premier Oil, have sold their Burmese investments.<sup>485</sup>

The EU also maintains close relations with the United States and the United Nations in order to maintain a united front toward Burma and to have access to all available information that would enable the EU to regularly and accurately evaluate the Burmese situation. Like the US, the EU has played a very active role in supporting UN processes. Yet, despite all of its own efforts, the European Union complains that thus far “the various initiatives of the international community have not been successful in improving the political situation” in Burma.<sup>486</sup>

#### **4. United States of America**

The United States has employed a variety of tactics to bring about change and facilitate improvement in the country. Officials in the United States say the long-term goals for Burma are to eradicate human rights abuses and to see the democratization process take hold and full reconciliation take place.<sup>487</sup> Immediate policy objectives include the release of political prisoners; participation and consultation of the NLD concerning political matters; significantly reducing human rights violations; and reducing the trafficking of drugs from Burma.<sup>488</sup> US officials feel that sanctions are “a key component of US policy in bringing democracy to Burma and have been a key source of support for the morale of many democracy activists.”<sup>489</sup>

In 1997 Congress passed an amendment to the Foreign Operations Appropriations Act permitting the President to impose sanctions against Burma.<sup>490</sup> Subsequently, President Bill Clinton took a firm stand in reaction to the abuses by the SPDC against the Burmese people, declaring Burma a national emergency.<sup>491</sup> Citing “large-scale repression of the democratic opposition in Burma,” President Clinton said that “the Government of Burma constituted an unusual and extraordinary threat to the national security and foreign policy of the United States.”<sup>492</sup> Clinton then imposed a ban on all new investments in Burma by US companies.<sup>493</sup>

In response to the regime’s failure to implement any meaningful reform and following the attempted assassination of Aung San Suu Kyi by the SPDC, Congress passed the Burmese Freedom and Democracy Act in 2003. This act and an accompanying Executive Order imposed an import ban on “all articles” from Burma, prohibited export of financial services, instituted a targeted asset freeze of assets

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<sup>484</sup> See Trade Sanctions report, *supra* note 461.

<sup>485</sup> See Trade Sanctions report, *supra* note 461.

<sup>486</sup> European Union, *supra* note 472.

<sup>487</sup> Conditions in Burma Report, *supra* note 431.

<sup>488</sup> See generally Conditions in Burma Report, *supra* note 431.

<sup>489</sup> *Developments in Burma*, Mathew P. Daley, Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony before the House International Relations Committee, Subcommittee on Asia and the Pacific and Subcommittee on International Terrorism, Nonproliferation and Human Rights, Mar. 25, 2004.

<sup>490</sup> See Leon T. Hadar, *U.S. Sanctions Against Burma: A Failure on All Fronts*, a Center for Trade Policy Studies Report, Mar. 26, 1998.

<sup>491</sup> *Prohibiting New Investment in Burma*, Executive Order 13047, Office of the Press Secretary, White House, May 20, 1997 (hereinafter Executive Order 13047).

<sup>492</sup> Executive Order 13047, *supra* note 491.

<sup>493</sup> Executive Order 13047, *supra* note 491.

associated with the SPDC, and established stricter visa restrictions on both current and previous Burmese officials preventing them from visiting the US<sup>494</sup> In 2005, President Bush extended the sanctions.<sup>495</sup>

The United States also systematically engages with the European Union and other members of the international community on the situation in Burma.<sup>496</sup> Similarly, the US supports efforts made in the UN to promote dialogue in Burma. For example, the US has repeatedly expressed its support for the UN Secretary-General's engagement with the SPDC as well as efforts by his Special Envoy and the Special Rapporteur.<sup>497</sup> Moreover, the United States often co-sponsors the annual human rights resolutions in both the UN General Assembly and UN Commission on Human Rights.<sup>498</sup>

Finally, the US provides substantial funding to provide humanitarian aid to refugees and vulnerable populations fleeing the Government of Burma.<sup>499</sup>

## **5. International Support for UN Security Council Action**

Because the Security Council wields unparalleled power and influence in the world community, many are calling for its official attention to the situation in Burma. The steps taken by individual nations and coalitions have produced no results. It is believed that without Security Council action, the national reconciliation process within Burma will not move forward. More importantly, without the unifying power of the Security Council to call for the immediate cessation of human rights violations and help provide protection to the Burmese people, these violations will continue unimpeded.

Support for Security Council action ranges from international scholars, Nobel Peace Prize Laureates, lawmakers, and former heads of state to members of the Burmese-recognized elected party, the NLD.

On June 18, 2005, the *International Herald Tribune* posted an open letter from European dignitaries wishing Aung San Suu Kyi a happy 60th birthday and stating the necessity of a "firm global coalition" which would be best served by the Security Council coordinating the pressure on the regime.<sup>500</sup> Aung San Suu Kyi's birthday wish was echoed by American lawmakers, Senators Mitch McConnell (R-KY), John McCain (R-AZ), and Dianne Feinstein (D-CA), who took a moment to remind the US of the Burmese regime's "gross violations of human rights" and its inability to curtail the export of both drugs and HIV/AIDS across its borders.<sup>501</sup> These American lawmakers also asked the UN Secretary-General to use his leadership position to request the Security Council to address the "threat that the Burmese regime poses to its people and to the region."<sup>502</sup> Perhaps the most touching birthday wish for Aung San Suu Kyi came from her fellow Nobel Prize Peace Prize laureates, who expressed their "solidarity with the people

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<sup>494</sup> Burmese Freedom and Democracy Act of 2003, Jul. 28, 2003; Executive Order, Blocking Property of the Government of Burma and Prohibiting Certain transactions, Office of the Press Secretary, White House. Jul. 28, 2003.

<sup>495</sup> President George W. Bush, *Burmese Freedom and Democracy Act of 2003 and Executive Order*, Press Release, Jul. 28, 2005.

<sup>496</sup> Developments in Burma, *supra* note 489.

<sup>497</sup> Conditions in Burma Report, *supra* note 431.

<sup>498</sup> Conditions in Burma Report, *supra* note 431.

<sup>499</sup> *Remarks to the Annual Conference of the U.S. Campaign for Burma*, Paula J. Dobriansky, Under Secretary of State for Global Affairs, Feb. 26, 2005.

<sup>500</sup> *Open Letter*, INTERNATIONAL HERALD TRIBUNE, Jun. 18, 2005.

<sup>501</sup> Senators Mitch McConnell and John McCain, *Lady Liberty*, Jun. 15, 2005; Statement by Senator Dianne Feinstein on the birthday of Aung San Suu Kyi, Jun. 17, 2005.

<sup>502</sup> *Id.*

Burma and their legitimate struggle for democracy, human rights and civilian rule.” The laureates also urged the “international community to maintain pressure against Burma’s military junta.”<sup>503</sup>

European lawmakers have also issued very strong requests for UN Security Council attention to Burma. In May 2005, the European Parliament called on the UN Security Council to address the situation in Burma as a matter of urgency and to empower the UN Secretary-General and his Special Envoy to mediate in Burma for national reconciliation and a transition to democracy.<sup>504</sup>

Individual governments have weighed in as well. In April 2005, 289 British parliamentarians joined together in a Commons Early Day Motion—the second most supported motion out of more than 1,000 considered—urging the British government to put Burma on the Security Council’s agenda.<sup>505</sup> In June, the Australian Senate passed a motion calling on the Government of Australia “to urge UN Security Council consideration of the plight of the Burmese people.”<sup>506</sup> In 2004, the Dutch Parliament adopted a resolution on Burma demanding stronger EU sanctions and asking that the Security Council discuss Burma.<sup>507</sup>

## **6. Response of the Government of Burma**

Ironically, since the military junta took power in 1988, the regime itself has called for democracy on countless occasions. Some examples of statements made by members of the regime through the years include:

- Then-chief of military intelligence Khin Nyunt, who went on to become the country’s prime minister and then was deposed in November 2004, told foreign military attachés in Rangoon on September 22, 1988, “elections will be held as soon as law and order has been restored and the Defense Services would then systematically hand over power to the party which wins.”<sup>508</sup>
- A short while later, then-head of the ruling SLORC Saw Maung said “the fact that we have formed a government with very few people is evidence that we have absolutely no desire to hold on to state power for a prolonged period . . . As our period of responsibility is very short, we will only be able to take limited action on social affairs such as health, education and other social services. The long-term reforms in social services, such as in health and education, have to be carried out by the government that comes to power after democratic multi-party general elections are held.”<sup>509</sup>
- Two years after that, Saw Maung said: “We have spoken about the matter of State power. As soon as the election is held, form a government according to law and then take power. An election has to be held to bring forth a government. That is our responsibility. But the actual work of forming a legal

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<sup>503</sup> Open Letter from Nobel Peace Prize Laureates on the Occasion of Aung San Suu Kyi’s 60th Birthday, signed by: Dr. Wangari Maathai, Shirin Ebadi, John Hume, David Trimble, Jody Williams, Bishop Carlos Filipe Ximenes Belo, Prof. Joseph Rotblat, Rigoberta Mench Tum, His Holiness the 14th Dalai Lama, Prof. Elie Wiesel, Bishop Desmond Tutu, Adolfo Pérez Esquivel, Betty Williams, and Mairead Corrigan.

<sup>504</sup> See *Human Rights in Burma/Myanmar*, EUROPEAN PARLIAMENT, P6\_TA-PROV(2005)0186, adopted May 12, 2005.

<sup>505</sup> *289 MPs Call for UN Action on Burma*, Apr. 6, 2005, available at

<http://www.burmacampaign.org.uk/pm/weblog.php?id=P157>.

<sup>506</sup> *Australian Senator Wants Burma Issue Discussed at UN Security Council*, at [www.mizzima.com](http://www.mizzima.com), Aug. 8, 2005.

<sup>507</sup> *Burma Resolution Adopted by Parliament*, Press Release, The Hague, Nov. 9, 2004.

<sup>508</sup> *Summary of World Broadcasts*, BBC NEWS, FE/0265 1, Sept. 24, 1988.

<sup>509</sup> *Summary of World Broadcasts*, BBC NEWS, FE/0266, 1, Sept. 26, 1988.

government after the election is not the duty of the Tatmadaw. We are saying it very clearly and candidly right now.”<sup>510</sup>

- In 1993, in a speech to the United Nations, SLORC then-Foreign Minister U Gyaw said, “The Tatmadaw [military] does not covet power. Nor does it have any desire to hold on to the reins of power.”<sup>511</sup>
- In 1997, when the SLORC changed its name to the SPDC, it again reiterated its desire for democracy. The state-run media at the time wrote that the change from SLORC to SPDC was designed to foster “the emergence of disciplined democracy in the country – and to build up a peaceful developed nation.”<sup>512</sup>
- In March 2005, following the removal of Khin Nyunt and Win Aung from power, Burmese supreme leader Than Shwe vowed to work towards a democracy with “discipline.”<sup>513</sup>

### III. Burma and the UN Security Council

#### A. Lessons from Past UN Security Council Interventions

In carrying out the momentous task of preserving international stability, the Security Council’s actions are guided by the principle of non-intervention, which “is a foundational principle of the present world order.”<sup>514</sup> Importantly, Article 2(7) provides an exception for the “enforcement measures under Chapter VII.”<sup>515</sup> Nevertheless, as discussed in Section II.A., the situation in Burma has reached beyond its borders and has had a clear transnational impact, and therefore does not require the Security Council to use this exception.

Article 39 of Chapter VII authorizes the Security Council to intervene in matters within the domestic jurisdiction of a state where a “threat to the peace, breach of the peace, or act of aggression” is occurring<sup>516</sup> Accordingly, the Security Council may take those measures necessary “to maintain or restore international peace and security”<sup>517</sup>

Relying on Chapter VII, the Security Council has intervened in countries when it regarded the situations in those countries as a threat to the peace requiring action by the Security Council to protect and preserve international stability. While the Security Council has no set criteria defining what constitutes a threat to the peace, a review of initial resolutions<sup>518</sup> passed by the Security Council in response to

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<sup>510</sup> Bertil Lintner, Information Sheet A – 0066(I/L)(r), Jul, 18, 1997, at <http://www.burmalibrary.org/reg.burma/archives/199707/msg00316.html>.

<sup>511</sup> Statement by U Gyaw, Minister of Foreign Affairs and Chairman of the Delegation of the Union of Myanmar, at the General Debate at the 48th Session of the General Assembly of the United Nations, New York, Oct. 1993 [on file with authors].

<sup>512</sup> *A Junta By Any Other Name*, IRRAWADDY MAGAZINE, 1997, at <http://www.irrawaddy.org/database/1997/vol15.7/junta.html>, last visited Sept. 1, 2005.

<sup>513</sup> *Myanmar Strongman Vows to Bring Democracy, Crush Anti-Indian Rebels*, AGENCE FRANCE PRESSE, Oct. 29, 2005.

<sup>514</sup> See Cedric E. Evans, *The Concept of “Threat to Peace” and Humanitarian Concerns: Probing the Limits of Chapter VII of the UN Charter*, TRANSNAT’L L. & CONTEMP. PROBS., Vol. 5, 1995, at 216 (explaining that the principle of non-intervention “serves as the primary legal impediment to the exercise of international jurisdiction by the United Nations in the domestic jurisdiction of its Member States”).

<sup>515</sup> *Id.*

<sup>516</sup> UN Charter art. 37.

<sup>517</sup> *Id.*

<sup>518</sup> This report only examines the justification for initial intervention by the Security Council in a particular situation in a country. In assessing the appropriateness of action in Burma, it is necessary to review the initial Security Council intervention where it adopted a resolution responding to a particular situation in a particular country, not subsequent action which would have

particular situations may provide guidance about the conditions and combinations of conditions the Council perceives and defines as a “threat to the peace.”

In reviewing all cases in which the Security Council determined that a threat to peace existed, it first becomes clear that the circumstances of each case vary. However, study of the Council’s past actions in such countries as Sierra Leone, Afghanistan, Haiti, Yemen, Rwanda, Liberia, and Cambodia does present clear patterns. The cases of Sierra Leone, Afghanistan, and Haiti, while not perfectly analogous to the situation in Burma, are particularly illustrative: in all three cases, the conflict and human rights abuses were perpetrated by a ruling regime against the people of that country—a pattern highly similar to that of Burma. These examples are being highlighted specifically to demonstrate relevant factors the Security Council cites as being most important in the assessment of a “threat to peace.” The Security Council’s actions in those cases (such as embargos or sanctions) are not being offered, however, as possible responses to the situation in Burma. Even in circumstances less similar to those already described, resolutions passed by the UN Security Council regarding Yemen, Rwanda, and Liberia demonstrate that the Security Council has considered similar factors in determining that a threat to peace and regional stability has occurred. In these situations, the conflicts and much of the resulting human rights abuses were perpetrated by insurgent armies fighting the government for control. We offer these examples to bolster the three primary examples—Sierra Leone, Afghanistan and Haiti.<sup>519</sup> Similarly, Cambodia is also discussed as an example of past action by the Security Council in situations of sustained conflict where it has intervened attempting to broker peace between warring parties.

A review of the case histories and the initial Security Council resolutions for the aforementioned countries enabled us to identify the following list of factors (“Determining Factors”) that encompass the Security Council’s primary reasons for determining that a “threat to the peace” exists warranting Council action: (1) the overthrow of a democratically-elected government; (2) conflict among governmental bodies and insurgent armies or armed ethnic groups; (3) widespread internal humanitarian/human rights violations; (4) substantial outflow of refugees; and (5) other cross-border problems (for instance, drug trafficking).<sup>520</sup>

In the various initiatives taken by the Security Council with respect to these countries, no single factor was dispositive to its decision to intervene. Instead, the Security Council considered the totality of the circumstances of each country’s situation in determining that a threat to the peace existed.

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responded to a further deterioration in the situation. For example, even though the situation in Rwanda ultimately resulted in a genocide being committed by the government and the insurgent army actually acted to put it down, we are only discussing the facts that existed at the time of the Security Council’s initial resolution responding to the conflict stemming from the insurgency in 1990.

<sup>519</sup> Although there are many countries where the Security Council has intervened in the past, these particular countries, whose situations are not as similar to the situations in Sierra Leone, Afghanistan, and Haiti, still share many similar circumstances and dispositive facts with Burma. For example, situations where the conflicts were not contained within the country were avoided as being too dissimilar. Similarly, situations such as that in Yugoslavia in 1991 where there was a complete breakdown of the state as a result of fighting among all the country’s ethnic groups, were also avoided. As a result, these three examples are offered as supportive evidence of factors that the Security Council considers when making a determination that a particular situation rises to the level of becoming a “threat to the peace.”

<sup>520</sup> These resolutions include S.C. Res. 1132, S/RES/1132 (1997) (Sierra Leone); S.C. Res. 1076, S/Res/1076 (1996) (Afghanistan); ); S.C. Res. 841, S/RES/841 (1993) (Haiti); S.C. Res. 924, S/RES/924 (1994) (Yemen); S.C. Res. 812, S/RES/812 (1993) (Rwanda); S.C. Res. 788, S/RES/788 (1992) (Liberia); S.C. Res. 668, S/RES/668 (1990) (Cambodia) (hereinafter S.C. Res. [Number]).

### Assessment of Initial Factors Resulting in UN Security Council Intervention

	Resolution	Overthrow of Democratic Government	Conflict Among Factions	Human. / Human Rights Violations	Refugee Outflows	Other (Drug Trafficking)	Other (HIV/AIDS)
Sierra Leone	S.C. 1132 (1997)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Afghanistan	S.C. 1076 (1996)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Haiti	S.C. 841 (1993)	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Yemen	S.C. 924 (1994)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Rwanda	S.C. 812 (1993)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Liberia	S.C. 788 (1992)		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
Cambodia	S.C. 668 (1990)		<input checked="" type="checkbox"/>				

## 1. Sierra Leone

Sierra Leone has a considerably tumultuous history. In 1996, after suffering a succession of military coups, the country's situation appeared to be improving. For example, parliamentary and presidential elections were held in Sierra Leone for the first time, resulting in a democratically-elected government under President Ahmad Tejan Kabbah.<sup>521</sup> Moreover, the rebel group Revolutionary United Front (RUF) signed a peace agreement, known as the Abidjan Agreement, with the new democratic Government of Sierra Leone.<sup>522</sup> These positive steps were short lived, however: talks relating to the Abidjan Agreement broke down when the RUF refused to negotiate.<sup>523</sup> In 1997, the RUF overthrew the democratically elected government, sending President Kabbah into exile.<sup>524</sup> The RUF took control of Sierra Leone, suspended the constitution, banned demonstrations, and abolished all other political parties.<sup>525</sup>

The conflict that ensued between the RUF and the ousted government resulted in mass human rights violations by the ruling RUF, including rape and murder of civilians.<sup>526</sup> The destruction of schools, health facilities, water supply systems, and transportation infrastructure compounded the humanitarian crisis.<sup>527</sup>

More than 1.5 million people were displaced as a result of the conflict and the mass human rights violations.<sup>528</sup> Approximately 361,000 refugees sought asylum in Sierra Leone's neighboring countries,

<sup>521</sup> *Id.*

<sup>522</sup> UN Doc. S/PV.3643 (1996); UN Doc. S/PV.3720 (1996).

<sup>523</sup> UN Doc. S/PV.3809 (1997).

<sup>524</sup> See UN Doc. S/PV.3797 (1997) (stating that after seizing power, the group involved in the coup released convicts from prisons and allowed the RUF into Freetown, where they looted property and murdered and raped civilians).

<sup>525</sup> *Timeline Sierra Leone*, BBC NEWS, at [http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/1065898.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1065898.stm), last updated Nov. 11, 2004

<sup>526</sup> UN Doc. S/1997/80 (1997).

<sup>527</sup> *Id.*

<sup>528</sup> UN Doc. S/1997/80 (1997).

primarily in the Republic of Guinea and Liberia.<sup>529</sup> This onslaught of refugees “overstretched the economy of Guinea and posed great difficulties to the political and social stability of the nation.”<sup>530</sup>

The Security Council determined that the deteriorating situation in Sierra Leone posed a threat to international peace and security in the region. In response, the Security Council adopted Resolution 1132, which demanded, among other things, that “the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order.”<sup>531</sup> Moreover, the Security Council noted that it was “[g]ravelly concerned at the continued violence and loss of life in Sierra Leone following the military coup . . . the deteriorating conditions in that country, and the consequences for its neighbors.” The Security Council called upon the junta “to end all acts of violence and to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone.”<sup>532</sup>

## **2. Afghanistan**

Following the withdrawal of the Soviet Union from Afghanistan in 1989, fighting among various factions ensued and the country became divided into several independent zones, each ruled by its own faction.<sup>533</sup> In 1996, although a weakly secured government existed in Afghanistan, one of these factions, the Taliban, armed by Pakistan, invaded and took control of Kabul, declaring itself the legitimate government of the Islamic Emirate of Afghanistan.<sup>534</sup> After invading Kabul and taking over most of the country, the Taliban carried out mass human rights violations. More than 2 million refugees fled to neighboring countries.<sup>535</sup>

On October 22, 1996, the Security Council adopted Resolution 1076, expressing concern over hostilities in Afghanistan that had caused civilian casualties and an increase in refugees and displaced persons, all of which the Security Council believed seriously endangered the stability and peaceful development of the region.<sup>536</sup> The resolution urged all Afghan parties to resolve their differences through peaceful means and achieve national reconciliation through political dialogue.<sup>537</sup> It also called on all states to refrain from outside interference in the internal affairs of Afghanistan, including the involvement of foreign military personnel and the supply of arms and ammunition to parties to the conflict in Afghanistan, and instead to use their influence to encourage cooperation by the Afghan parties with the UN Special Mission to Afghanistan.<sup>538</sup> Furthermore, the Security Council expressed concern about the abuses of human rights and called upon the leaders of the Afghan parties to halt activities such as terrorism and drug trafficking which endangered the stability of the region.<sup>539</sup>

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<sup>529</sup> *Id.* See also UN Doc. S/PV.3797 (1997) (stating that refugees also had fled to Ghana, Nigeria, Côte d’Ivoire, Gambia, and other countries in the subregion).

<sup>530</sup> See UN Doc. S/PV.3797 (1997) (explaining that the Republic of Guinea was already overburdened by the number of refugees it had received from Liberia).

<sup>531</sup> See S.C. Res. 1132, *supra* note 520 (expressing in the Resolution that the Security Council “deplor[es] the fact that the military junta has not taken steps to allow the restoration of the democratically-elected Government and a return of constitutional order”).

<sup>532</sup> S.C. Res. 1132, *supra* note 520.

<sup>533</sup> Country Study: Afghanistan, Federal Research Division, Library of Congress, at <http://lcweb2.loc.gov/frd/cs/aftoc.html#af0126>, last visited Sept. 1, 2005.

<sup>534</sup> *Id.*

<sup>535</sup> *Situation of Human Rights in Afghanistan 1975/74*, U.N. Commission on Human Rights, E/CN.4/1995/176, Mar. 8, 1995.

<sup>536</sup> See S.C. Res. 1076, *supra* note 520.

<sup>537</sup> See *id.*

<sup>538</sup> See *id.*

<sup>539</sup> See *id.*

### **3. Haiti**

As in Sierra Leone, a de facto military regime in Haiti overthrew the democratically-elected government of President Jean-Bertrand Aristide one year after his election.<sup>540</sup> Under the regime's rule, the people of Haiti were subjected to "preventive repression, persecution, arbitrary detention and torture."<sup>541</sup> The regime systematically denied fundamental human rights and created a situation "where political choice [was] exercised only in the dangerous act of seeking refuge elsewhere."<sup>542</sup> Forty thousand Haitians fled the country as a result of the repression, many of them seeking refuge in Cuba.<sup>543</sup>

On October 11, 1991, the General Assembly adopted a resolution calling on the military regime to re-establish constitutional order in Haiti and reinstate President Aristide.<sup>544</sup> The Organization of American States (OAS) attempted to engage the regime in negotiations, but the regime rejected its proposals.<sup>545</sup> To provide support to the efforts of the OAS and the UN General Assembly, the Security Council adopted Resolution 841 in 1993, in which the Security Council stated that it "[d]eplor[ed] the fact that, despite efforts of the international community, the legitimate Government of President Jean-Bertrand Aristide has not been reinstated."<sup>546</sup> Taking note of the humanitarian crisis in the text of the resolution, the Security Council expressed its concern that "the persistence of this situation contributes to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighboring member states and convinced that a reversal of this situation is needed to prevent its negative repercussions on the region."<sup>547</sup> The Security Council thus determined that the situation in Haiti posed a threat to international peace and security in the region.<sup>548</sup>

### **4. Republic of Yemen**

The Republic of Yemen fell into crisis on May 5, 1994, when separatist rebels launched a civil war against the Government of Yemen.<sup>549</sup> The rebels were members of the former totalitarian regime that had lost Yemen's first parliamentary elections in April 1993. They sought to "establish a State in the south under the leadership of the rebel Ali Salim al-Bidh."<sup>550</sup> These rebels took control of Aden, the economic and commercial hub of Yemen, and halted the operations of the country's government.<sup>551</sup> Consequently, "the country almost fell into a state of complete anarchy, the economic, social and health situation deteriorated, the security situation worsened, and the most heinous violations of human rights took place in the prisons of Aden that these persons subjected to their direct control."<sup>552</sup> During the

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<sup>540</sup> See UN Doc. S/25942 (1993) (Letter from the Permanent Representative of Cuba).

<sup>541</sup> UN Doc. S/PV.3238 (1993).

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*; see also UN Doc. S/25942 (1993) (explaining that "Cuba, as one of Haiti's closest neighbors, has received thousands of refugees from this long-suffering country, perhaps more than any other State of the region, and has never considered that this flow threatened peace and security in the geographical area in which it is situated, but has viewed it as a purely humanitarian question which must be resolved, as it has been doing to date, through the international organizations and bodies which deal with refugees and displaced persons").

<sup>544</sup> UN Doc. S/PV.3238 (1993).

<sup>545</sup> See *id.* (commending His Excellency Mr. Dante Caputo, Special Envoy of the Organization of American States and the United Nations for its efforts in attempting to achieve a settlement with the regime).

<sup>546</sup> S.C. Res. 841, *supra* note 520 (imposing a trade embargo on the country).

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> UN Doc. S/PV.3394 (1994).

<sup>550</sup> UN Doc. S/1994/642 (1994).

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

armed conflict, furthermore, large numbers of innocent civilians were killed and property was destroyed.<sup>553</sup>

Yemen's political parties, however, vociferously objected to proposals of outside intervention, believing this would only complicate matters and would constitute an "assault on territorial unity and sovereignty of the Republic of Yemen" and an alleged "violation of international law."<sup>554</sup> Despite Yemeni protests, the Security Council passed Resolution 924 on the grounds that the continuance of the situation could pose a threat to peace and security in the region.<sup>555</sup> In the text of the resolution, the Security Council noted its deep concern for the tragic deaths of innocent civilians and requested that the parties cease hostilities immediately and negotiate a peace.<sup>556</sup>

## **5. Rwanda**

On October 1, 1990, the Rwandese Patriotic Front (RPF) launched a civil war against the Government of Rwanda which resulted in the massacres of large numbers of civilians and mass human rights violations.<sup>557</sup> In 1992, the RPF and the Government of Rwanda signed a ceasefire agreement at Arusha, Tanzania.<sup>558</sup> Despite the ceasefire agreement, fighting between the parties resumed.<sup>559</sup> The fighting ultimately resulted in the displacement of approximately 1 million persons and left one-seventh of the population without shelter.<sup>560</sup>

After listening to Rwanda's Permanent UN Representative's plea for assistance, in March 1993 the Security Council passed Resolution 812, the first resolution passed on Rwanda, on the basis of its "[g]rave concern [over] the fighting in Rwanda and its consequences for international peace and security."<sup>561</sup> The Security Council asserted that it was "[a]larmed by the humanitarian consequences of the latest resumption of the fighting in Rwanda, in particular the increasing number of refugees and displaced persons, and by the threats to the civilian population."<sup>562</sup> The resolution called on the

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<sup>553</sup> UN Doc. S/PV.3386 (1994) (relaying the statement from Mr. Li Zhaoxing, the Permanent Representative from China, regarding China's concern about the conflict in Yemen).

<sup>554</sup> UN Doc. S/1994/641 (1994); UN Doc. S/1994/642 (1994). In anticipation of the Security Council's meeting regarding the situation in Yemen, the Permanent Representative of Yemen transmitted two letters expressing the views of the Yemeni political parties and organizations. The letters pleaded with the Security Council to refrain from intervening in Yemen:

We wish to call your attention . . . to our absolute rejection of any intervention by the Council in what is taking place in our country. This is an internal matter, and what is happening is an endeavor by the entire people to preserve the unity that guarantees its stability and the stability of the region in the face of a separatist rebellion aimed against the country's unity, constitutional legitimacy and stability.

*See also* UN Doc. S/1994/642 (1994) ("What is happening in Yemen is not a war between north and south, as some claim, or between one State and another. It is a war between the people as represented by its lawful and constitutionally elected leadership and a small rebel separatist group of Socialist Party leaders.")

<sup>555</sup> *See* S.C. Res. 924, *supra* note 520 (calling for an immediate ceasefire and urging the parties to resume negotiations).

<sup>556</sup> *Id.*

<sup>557</sup> *See* UN Doc. S/PV.3183 (1993) (providing examples of human rights violations, such as "calling farmers to a meeting before massacring them with machine-gun fire; shutting-up scores of people in a house before killing them with grenades or explosives; disemboweling women and old people; shootings in displaced-persons camps; dismemberment, gouging out of the eyes and cutting-off breasts; binding people hand and foot; and so on.")

<sup>558</sup> *See* UN Doc. S/25363 (1993) (explaining that the N'sele ceasefire agreement was amended at Gbadolite on Sept. 16, 1991, and at Arusha on Jul. 12, 1992).

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> S.C. Res. 812, *supra* note 520.

<sup>562</sup> The Security Council became particularly concerned about the destabilizing effects of the situation in Rwanda in light of the ongoing crisis in Somalia. *See id.* (stating that the Morocco delegation was particularly concerned that the "tragic developments . .

government and the RPF to refrain from interfering with the provision of humanitarian aid and the return of displaced persons and to strictly comply with international humanitarian law.<sup>563</sup> The resolution also “[s]tressed the need for a negotiated political solution, in the framework of the agreements signed by the parties in Arusha” and set forth a framework for beginning a settlement to the conflict.<sup>564</sup>

## **6. Liberia**

In 1989, Liberia became engulfed in a civil war between the National Patriotic Front of Liberia (NPFL), led by Charles Taylor, and the United Liberation Movement of Liberia (ULIMO). Much of the fighting was “inspired by the memory of the former President of Liberia,” who was killed during the war.<sup>565</sup> As both sides struggled to seize political power, thousands of civilians were killed, raped, tortured, and taken hostage.<sup>566</sup> Those who survived endured sickness and famine and were often forced to “wander the forest for days, ferreting for food while fleeing from the fugitive warlord Charles Taylor and his rebel fighters.”<sup>567</sup>

Neighboring countries expressed concern that “the war will spread to the entire West African sub-region if the protagonists continue . . . to speak the language of arms<sup>568</sup> rather than dialogue and reason.”<sup>569</sup> West Africa also contains a prosperous drug trade, and other states in the region feared that Liberia would be turned into a regional “narcocenter for drug trafficking.”<sup>570</sup> The situation in Liberia posed a particularly severe threat for neighboring Sierra Leone, which received thousands of the refugees who fled from Liberia.<sup>571</sup> When Sierra Leone permitted Liberian peacekeeping forces to use its country as a base, the NPFL instigated an armed attack on Sierra Leone.<sup>572</sup>

The Economic Community of West African States (ECOWAS) and other international organizations attempted to broker a peaceful settlement between the parties, such as facilitating the execution of a ceasefire agreement. These attempts failed and the situation deteriorated.<sup>573</sup> Finding that the situation in Liberia clearly threatened international peace and security, the Security Council passed

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. could lead to a greater deterioration of the situation in that country, as we remember all too well the past and present horrors experiences by the people of the brotherly country of Somalia”).

<sup>563</sup> *Id.*

<sup>564</sup> *See id.* (asserting that the UN should examine the steps it could take to assist in facilitating a political settlement and in avoiding the onset of further fighting).

<sup>565</sup> UN Doc. S/PV.3138 (1992).

<sup>566</sup> *See id.* (asserting that Charles Taylor and the NPFL had committed numerous war crimes and crimes against humanity, including murdering five American nuns and over 160 schoolchildren).

<sup>567</sup> *Id.* According to the Permanent Representative of Sierra Leone: “our national economy is in ruins, as the government has had to spend hard-earned resources to defend our country from Charles Taylor, who for more than a year now has been occupying and ravaging some of the most productive areas of my country in terms of agriculture and diamond production, looting and smuggling those products to acquire arms to continue his armed aggression and to enrich himself personally.”

<sup>568</sup> *Id.* Countries in the region feared that the conflict was “transforming West Africa into an arms market”

<sup>569</sup> *See id.* (providing the statement of Mr. Holo, Permanent Representative of Benin, regarding the crisis in Haiti).

<sup>570</sup> *See id.* (relaying the statement of Mr. Koroma, Permanent Representative of Sierra Leone, who stated that “[t]oday it is Sierra Leone that is under attack, but there are other small and equally vulnerable countries in the subregion that should not be allowed to fall pretty to a fugitive warlord [(Charles Taylor)] whose aim is to make Liberia a narcocentre for drug trafficking in our region if he is once able to shoot his way into power in Monrovia.”).

<sup>571</sup> *See id.* (explaining that Sierra Leoneans welcomed Liberian refugees into their homes, schools, hospitals, and places of employment).

<sup>572</sup> *See id.* (asserting that Charles Taylor launched this attack because Sierra Leone refused to allow him to use their country for his weapons trade).

<sup>573</sup> UN Doc. S/PV.3138 (1992). In May 1990, the Standing Mediation Committee of ECOWAS took steps to establish a ceasefire, formed a group to monitor the ceasefire, created a transitional government, gathered emergency funds for ECOWAS, and created an observer group to monitor elections. Six months later, ECOWAS established a peace plan for Liberia and the sub-region. In the following two years, ECOWAS held meetings in Yamoussoukro and Geneva to solidify the settlement framework. Despite these, and various subsequent efforts on the part of ECOWAS, the NPFL refused to adhere to the peace process.

Resolution 788 on November 19, 1992<sup>574</sup>, denouncing the violations of the ceasefire agreement and demanded that the parties abide by the already established settlement framework.<sup>575</sup> The Council also noted the deterioration of the situation hindered the “creation of conditions conducive to the holding of free and fair elections.”<sup>576</sup>

## **7. Cambodia**

The Security Council had already issued a variety of resolutions requesting warring factions in Cambodia to end the conflict and reach a peaceful settlement. In 1990 the Council stepped beyond a simple acknowledgement of the situation, adopting Resolution 668 in which it specifically tried to facilitate the peace process in Cambodia by providing guidance.<sup>577</sup> Resolution 668 endorsed a framework for a political settlement and encouraged the parties to adhere to an agreement to form a “Supreme National Council as the unique legitimate body and source of authority in which, throughout the transitional period, the independence, national sovereignty and unity of Cambodia is embodied.”<sup>578</sup>

### ***B. Application of UN Security Council Criteria to Situation in Burma***

Section III.A. above sets forth a list of determining factors evaluated by the Security Council in justifying its *initial* resolutions where the Council found a threat to the peace. Applying these determining factors to the situation in Burma demonstrates that Burma represents a clear threat to the peace and that Security Council action is both justified and warranted. The presence or absence of each determining factor varied with respect to the countries presented. The situation in Burma, however, exhibits each and every one of these determining factors. In this regard, Burma is unique. All of the factors in tandem threaten the peace and stability of Burma as well as the entire region as large numbers of displaced persons, refugees, and migrants flee into neighboring countries attempting to escape the conflict and extreme poverty.

#### **Application of Determining Factors to Situation in Burma**

	<b>Resolution</b>	<b>Overthrow of Dem. Gov't</b>	<b>Conflict Among Factions</b>	<b>Human. / Human Rights Violations</b>	<b>Refugee Outflows</b>	<b>Other (Drug Trafficking)</b>	<b>Other (HIV/AIDS)</b>
<b>Burma</b>	-	✓	✓	✓	✓	✓	✓

What makes the situation in Burma even more problematic, however, is that while these determining factors are present in a comparatively severe manner in Burma, additional distinguishing facts and circumstances exist in Burma that increase the overall magnitude of this threat. Such factors include systematic violations of human rights by the regime including forced labor, forced relocation, the use of child soldiers by the regime’s military, and rape of village women by soldiers; the government’s ineffectiveness at curbing the flow of drugs from its borders; and the government’s unwillingness to cooperate with the international community to curb the spread of HIV/AIDS. Moreover, the regime is

<sup>574</sup> S.C. Res. 788, *supra* note 520.

<sup>575</sup> *See id.* (noting that these accords are the Yamoussoukro IV Accord and the Final Communiqué of the Informal Consultative Group Meeting of ECOWAS Committee of Five on Liberia and asserting the Security Council’s conviction that the Yamoussoukro IV Accord provided the most comprehensive framework for a peaceful settlement; the Accord sought to establish the conditions conducive to allowing free and fair elections).

<sup>576</sup> *See id.*

<sup>577</sup> *See* S.C. Res. 668, *supra* note 520 (hereinafter S.C. 668) (stating that the Security Council was “[c]onvinced of the need to find an early, just and lasting peaceful solution to the Cambodia conflict”).

<sup>578</sup> *See id.* (urging the parties to “exercise maximum self-restraint” during the peace process).

responsible for an alarming decline in the economic situation. The regime is also denying adequate health care to most of the populace. As a result, Burma's people are descending into extreme poverty and rampant disease. Refugees seeking freedom from conflict as well as freedom from poverty are flooding into neighboring countries. The overall situation in Burma is severe. To maintain the peace and help Burma return to democratic rule, Security Council intervention is required.

## **1. Overthrow of a Democratically-Elected Government**

The current government in Burma came to power in 1962 by overthrowing the elected government and establishing a military regime. The generals abolished the constitution and put in place a one-party system. What is somewhat unique in the case of Burma, however, is that, after a period of bloody unrest in 1988, the regime actually allowed a multi-party election to take place. The NLD party emerged from that election as the new democratically-elected government of Burma. The military regime, however, never allowed the NLD to take power. Instead, it harassed, jailed, and even murdered NLD members. Fifteen years later, the NLD has still been denied the right to take power, and the regime even remains resistant to engaging in dialogue with NLD members despite numerous and unceasing international requests.

In both the situations of Sierra Leone and Haiti, the Security Council issued resolutions demanding that the military juntas relinquish power and make way for the restoration of democratically-elected governments.<sup>579</sup> In addition, the Council requested cessation of acts of violence and interference with the delivery of humanitarian assistance.<sup>580</sup> The Security Council ultimately concluded that the situations in both countries constituted a threat to international peace and security in the region and requested that the juntas give power back to the rightfully elected governments.

Similarly, the General Assembly and the Commission on Human Rights have continuously adopted resolutions calling upon Burma's regime to "restore democracy and respect the results of the 1990 elections."<sup>581</sup> The Government of Burma had no real incentive to follow these recommendations, since the resolutions were non-binding.

## **2. Conflict Between the Regime and Ethnic Groups**

Conflict between the central government and the various ethnic groups in Burma has persisted for many years. Components of that conflict include actual fighting between various ethnic groups and the regime and grave human rights abuses carried out by the regime against innocent civilians in ethnic-controlled areas. Numerous non-governmental organizations have called for an end to these conflicts. More particularly, such UN bodies as the General Assembly and the Commission on Human Rights have issued resolutions specifically acknowledging the different instances of conflict in Burma and calling for the regime to withdraw from these matters and pursue a solution through dialogue with these groups.<sup>582</sup>

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<sup>579</sup> See S.C. Res. 1132, *supra* note 520; See S.C. Res. 841, *supra* note 520.

<sup>580</sup> See S.C. Res. 1132, *supra* note 520; See S.C. Res. 841, *supra* note 520.

<sup>581</sup> See 2005 UN Commission Resolution, *supra* note 210; *see also* 2005 UN General Assembly Resolution, *supra* note 421.

<sup>582</sup> Both have called for an end to the "systematic violations of human rights. . . persistently carried out by members of the armed forces." The General Assembly requested that the "next session of the National Convention is fully inclusive of all political parties" Similarly, the Commission on Human Rights has requested that the junta "enter into a substantive and structured dialogue with Aung San Suu Kyi and other leaders of the National League for Democracy intended to lead towards democratization and national reconciliation." Both bodies have asked that democracy be restored and the results of the 1990 elections respected. Finally, both bodies have called for the regime to "pursue through dialogue and peaceful means the immediate suspension and permanent end of conflict with all ethnic groups in Myanmar." *See* 2005 UN Commission Resolution, *supra* note 210; *see also* 2005 UN General Assembly Resolution, *supra* note 421.

In past cases, the Security Council intervened in conflicts that were aggravated by warring factions unable to adhere to a signed ceasefire agreement. For example, in the cases of Rwanda and Cambodia, the Security Council took an active approach by attempting to assist the warring parties in those countries with their peace processes.<sup>583</sup> The case of Burma offers factors similar to those of Rwanda and Cambodia. Fighting between the government and ethnic groups has persisted over time—despite some uneasy ceasefire agreements—with no sustained progress. Security Council assistance in brokering peace between the ethnic groups and the government, as well as facilitating peace throughout the country generally, is well merited and overdue.

### **3. Widespread Internal Humanitarian / Human Rights Violations**

Security Council resolutions generally cite occurrences of gross violations of human rights in situations of conflict. Severe violations of human rights have been an important factor considered by the Security Council, whether the abuses are perpetrated by the ruling regime as in Haiti, Sierra Leone, and Afghanistan or whether they are occurring as a result of conflict and are being committed by insurgent parties, as in Yemen, Liberia, and Rwanda.

In the cases outlined above, there is no question that the Security Council acted in part out of concern for the civilian populace of those countries, hoping to protect those people from further atrocities. The Security Council has repeatedly demonstrated its commitment to prevent gross violations of human rights. This has been the case even when the human rights violations may have occurred wholly within a country itself, because especially severe and systematic human rights abuses create general instability and result in refugee flows to neighboring countries, thus threatening regional peace and security.

The human rights abuses that have occurred in Burma since the military regime took power have escalated substantially and are similar to the abuses discussed by the UN in the cases mentioned above. These abuses include extrajudicial killing, torture, disappearances, arbitrary detention, and rape. In addition to the violations considered by the UN in these other conflict situations, the Government of Burma is perpetrating even more atrocities, reflecting the unique and serious nature of the human rights situation in Burma. These violations include destruction of villages, forced labor, and the use of child soldiers. Moreover, atrocities such as systematic rape by government soldiers are widespread and occur not only in conflict areas such as ethnic regions and areas of forced relocation but in relatively peaceful villages.

According to the most recent resolution adopted by the UN Commission on Human Rights, substantiated violations by the regime include:

Extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces, continuing use of torture, renewed instances of political arrests and continuing imprisonment and other detentions, including of prisoners whose sentences have expired; prisoners held *incommunicado* while awaiting trial; forced relocation; destruction of livelihoods and confiscations of land by the armed forces; forced labor, including child labor; trafficking in persons; denial of freedom of assembly, association, expression and movement; discrimination and persecution on the basis of religious or ethnic background; wide disrespect for the rule of law and lack of independence of the judiciary; unsatisfactory conditions of detention; systematic use of child soldiers; and

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<sup>583</sup> See S.C. Res. 812 (Rwanda); see S.C. Res. 668 (Cambodia).

violations of the rights to education and to an adequate standard of living, including food and medical care.<sup>584</sup>

The combination of both the severity of the abuses in Burma and the length of time these violations have persisted leads to an inevitable conclusion: compared to many countries where the Security Council has taken action in the past, the situation in Burma is more grave. A closer examination of the most disturbing features of the situation in Burma—set out below—only reaffirms this conclusion.

#### *Destruction of Villages and Forced Relocation*

Burma is considered to be “one of the world’s worst Internally Displaced Persons (IDP) situations” as a result of the destruction of over 2,700 villages by the regime in furtherance of its desires to suppress ethnic populations and to make way for development projects for its own commercial gain.<sup>585</sup> According to one knowledgeable observer, the destruction in Burma “clearly implies a scale of destruction far more comprehensive than what is generally understood as a counter insurgency campaign,” particularly since civilians are targeted solely on the basis of their ethnicity.<sup>586</sup> Such targeting of civilians is in clear contravention of Security Council Resolution 1296 which “reaffirm[ed] [the Council’s] strong condemnation of the deliberate targeting of civilians or other protected persons in situations of armed conflict.”<sup>587</sup>

To further complicate the situation, international organizations seeking to deliver humanitarian assistance to IDPs in Burma are not permitted to access many of the regions where IDPs have been relocated.<sup>588</sup> Acknowledging the crisis of IDPs in Burma, both the UN General Assembly and UN Commission on Human Rights in their respective 2005 resolutions adopted on the situation in Burma called on the government to “end the systematic enforced displacement of persons.”<sup>589</sup>

In 2000, the Security Council commented that the “deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant, and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security.”<sup>590</sup> Based on the documented evidence of widespread destruction of villages and targeting of civilians, such a description applies to the situation in Burma today.

#### *Forced Labor*

Under direct threat of jail or bodily injury,<sup>591</sup> hundreds of thousands of Burmese civilians are forced to work on infrastructure projects that involve the construction of roads, dams, railroads, and military barracks with little or no pay.<sup>592</sup> Similarly, civilians, often young children, are forced to serve in the military as soldiers and porters.<sup>593</sup>

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<sup>584</sup> 2005 UN Commission Resolution, *supra* note 210.

<sup>585</sup> See IDP Project Report, *supra* note 207; TBBC Report, *supra* note 222, at 1-2.

<sup>586</sup> See Guy Horton Report, *supra* note 174 at 237.

<sup>587</sup> S.C. Res. 1296, S/RES/1132, adopted Apr. 19, 2000, at para. 2 (hereinafter S.C. Res. 1296).

<sup>588</sup> *Id.*

<sup>589</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>590</sup> S.C. Res. 1296, *supra* note 587, at para. 5.

<sup>591</sup> See *id.* (noting reports of civilians who witnessed the junta’s murder of laborers who were unable to sufficiently perform their duties); see also Report of the Director General, *supra* note 265 (describing the police’s threats to prosecute villagers who refused to work for them).

<sup>592</sup> Amnesty International’s Concerns, *supra* note 263.

<sup>593</sup> *Id.*

In response to the regime's continuing use of forced labor and its refusal to even acknowledge the practice, the ILO adopted an unprecedented resolution to compel the Government of Burma to comply with its obligations under the Forced Labor Convention (No. 29) of 1930.<sup>594</sup> Despite measures taken by the ILO, the organization has concluded that its past attempts to facilitate progress were futile, while noting that the situation in Burma "demonstrates that it is impossible to make effective progress against forced labor when there is a climate of impunity and repression against persons who denounce forced labor abuses."<sup>595</sup> Similarly, the UN General Assembly and UN Commission on Human Rights have requested that the government "take immediate action to implement fully concrete legislative, executive and administrative measures to eradicate the practice of forced labor by all organs of Government, including the armed forces."<sup>596</sup>

### *Rape*

The Burmese army is the primary perpetrator of sexual violence against women.<sup>597</sup> Burmese soldiers use rape systematically and in a widespread fashion both as a method of torture and as part of a campaign to breed ethnicities out of the population.<sup>598</sup>

In 2000, after collecting an overwhelming amount of evidence of sexual violence against women in areas of conflict, the UN Security Council adopted Resolution 1325 calling on all parties to armed conflict "to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict."<sup>599</sup> Moreover, the Security Council emphasized "the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls."<sup>600</sup>

In keeping with the precedent established by the Security Council, the Commission on Human Rights and the General Assembly both requested that the Government of Burma "end widespread rape and other forms of sexual violence persistently carried out by members of the armed forces, in particular against women belonging to ethnic minorities, and to investigate and bring to justice any perpetrators in order to end impunity for these acts."<sup>601</sup>

Faced with the binding resolution issued by the Security Council relating to women and the resolutions by the Commission on Human Rights and the General Assembly relating specifically to Burma,<sup>602</sup> the government has chosen to ignore the resolutions and has taken steps to prevent representatives, such as the UN Special Rapporteur, from investigating the situation.<sup>603</sup>

### *Child Soldiers*

Burma has 70,000 child soldiers, a number exceeding that of any other country in the world.<sup>604</sup> The army often captures boys in public places and threatens them with imprisonment if they do not

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<sup>594</sup> Convention Concerning Forced or Compulsory Labor (No. 29), *supra* note 267.

<sup>595</sup> Report of the Director General, *supra* note 265, para. 108-09.

<sup>596</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>597</sup> See License to Rape, *supra* note 275, at 9.

<sup>598</sup> See No Safe Place, *supra* note 275, at 45.

<sup>599</sup> See Security Council Resolution 1325, *supra* note 281.

<sup>600</sup> *Id.*

<sup>601</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>602</sup> See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>603</sup> See Dept. of State Report, *supra* note 69.

<sup>604</sup> My Gun Was As Tall As Me, *supra* note 396 (explaining that Human Rights Watch determined the number of child soldiers in Burma during an investigation in 2002, which included interviews of former government soldiers).

enlist.<sup>605</sup> The regime has conceded that the use of child soldiers is an “issue.”<sup>606</sup> Moreover, the United Nations has documented cases of child soldiers fleeing Burma into Thailand and both the General Assembly and the Commission on Human Rights have requested that the regime immediately cease this practice.<sup>607</sup>

In an attempt to combat the pervasive issue of child soldiers, the UN Security Council adopted Resolutions 1460 and 1612, among others, calling upon all concerned parties to end the use of child soldiers in violation of international law and expressed the Security Council’s support for the enforcement of the Optional Protocol to the Convention on the Rights of the Child.<sup>608</sup>

Burma’s continued use of child soldiers not only contravenes Resolutions 1460 and 1612, it also violates Burma’s obligations as a signatory to the Convention on the Rights of the Child.<sup>609</sup>

#### **4. Substantial Outflow of Refugees**

Refugee outflow is also an important factor considered by the Security Council in determining whether a threat to the peace exists. In all the cases discussed in the previous section, varying numbers of refugees had fled those conflicts by the time the Security Council initially acted. In fact, in the cases of Sierra Leone, Afghanistan, Haiti, and Rwanda, the Security Council specifically cited its concern over refugees as a factor in the “threat to the peace and stability of the region.”<sup>610</sup>

Refugee statistics for cases presented in Section III.A. at the time of Security Council action (excluding Yemen which had minimal flows) were:

- Afghanistan – approximately 2 million refugees fled to neighboring countries.<sup>611</sup>
- Liberia – Some 750,000 refugees fled to Guinea, Côte d’Ivoire, and Sierra Leone.<sup>612</sup>
- Sierra Leone – approximately 361,000 refugees sought refuge in Sierra Leone’s neighboring countries, primarily in the Republic of Guinea and Liberia.<sup>613</sup>
- Rwanda – approximately 300,000 refugees fled to neighboring countries.<sup>614</sup>
- Cambodia – 300,000 refugees in three major camps in Thailand.<sup>615</sup>
- Haiti – approximately 40,000 refugees fled to Cuba and Dominican Republic.<sup>616</sup>

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<sup>605</sup> See *id.* (stating that recruiters are rewarded with money and bags of rice for each soldier they enlist).

<sup>606</sup> See Human Rights Watch Report, *supra* note 60.

<sup>607</sup> Children and Armed Conflict, *supra* note 416; See 2005 UN Commission Resolution, *supra* note 210; see also 2005 UN General Assembly Resolution, *supra* note 421.

<sup>608</sup> See *id.* (noting that the Rome Statute of the International Criminal Court categorizes as a war crime the use of children under the age of 15 as soldiers in national armed forces or as active participants in hostilities).

<sup>609</sup> See Office of the United Nations High Commissioner for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties*, United Nations, Jun. 9, 2004 (noting that Burma signed the Convention on the Rights of the Child on Aug. 14, 1991).

<sup>610</sup> See S.C. Res. 812 (Rwanda); see S.C. Res. 1076 (Afghanistan); See S.C. Res. 1132 (Sierra Leone); See S.C. Res. 841 (Haiti).

<sup>611</sup> *Situation of Human Rights in Afghanistan 1975/74*, Commission on Human Rights, United Nations, chap. XII. E/CN.4/1995/176, Mar. 8, 1995.

<sup>612</sup> Foday Fofanah, *Stranded Liberian Refugees Head for Home*, REUTERS, Mar. 30, 1992.

<sup>613</sup> *Id.*; See also UN Doc. S/PV.3797 (1997) (stating that refugees also had fled to Ghana, Nigeria, Côte d’Ivoire, Gambia, and other countries in the subregion).

<sup>614</sup> *Populations of Concern to UNCHR: A Statistical Overview*, Office of the United Nations High Commissioner for Refugees, 1994. Note, we are examining refugee flows before the genocide because this was the relevant point of reference when the Security Council first decided to get involved.

<sup>615</sup> *Cambodians Won’t be Forced to Return*, BANGKOK POST, Mar. 8, 1990; see also Elizabeth Pisani, *Cambodian Refugees Kept in Limbo in Effort to Keep Numbers Low*, REUTERS, Nov. 7, 1990, citing 2,000 Cambodian refugees in camps in Indonesia.

<sup>616</sup> See UN Doc. S/PV.3238 (1993); see also UN Doc. S/25942 (1993).

By comparison, today there are at least 700,000 Burmese refugees living in neighboring countries.<sup>617</sup> In addition to those figures, there are likely over an additional 1 million Burmese people living in Thailand who are undocumented by Thai authorities and are, therefore, not specifically categorized as refugees.<sup>618</sup> Most of these million Burmese have not registered in Thailand as refugees because they fear imprisonment or repatriation to Burma. Thailand thus categorizes them as irregular migrants or economic refugees,<sup>619</sup> although it appears that they are generally, and appropriately, understood to be refugees.<sup>620</sup> These statistics provide substantial evidence of cross-border effects emanating from Burma as a result of its internal conflict—effects that are burdening the region and have particularly affected Thailand. It is these effects that generate instability and threaten the peace.

## **5. Other Cross Border Problems**

### *Drug Production and Trafficking in Burma*

Burma is a major producer and supplier of opium, heroin, and ATS to international markets.<sup>621</sup> Once heroin and ATS are manufactured in Burma, the drugs are trafficked out of the country following specific routes<sup>622</sup> which primarily run through India, Thailand, and China.<sup>623</sup> Thailand and China are the largest victims of the heroin and ATS produced in Burma, but the illicit trade is increasingly affecting India as well.<sup>624</sup>

Despite claims by the Government of Burma that it has had substantial success in diminishing production, the US consistently refuses to certify Burma as a “cooperating nation,” stating that “Burma has failed demonstrably to meet its international counter-narcotics obligations.”<sup>625</sup> Moreover, there is strong speculation that senior Burmese officials, and in fact the government generally, may be directly involved in the drug trade for their own commercial gain.<sup>626</sup>

Little doubt exists that drug trafficking has a tremendous negative effect on international stability. In fact, when the Security Council adopted Resolution 1076 regarding the situation in Afghanistan, it made specific note of its concern over the trafficking of opium in the region and stated that the conflict in Afghanistan “provides fertile ground for . . . drug trafficking which destabilizes the region and beyond.”<sup>627</sup> Similarly, in Burma, drug trafficking has fueled the fighting between the ethnic groups and the regime. Moreover, drug trafficking is having a substantial impact on the people of Burma as drug use rises; and it is having a substantial impact in neighboring states that receive the majority of the drugs. Furthermore, the toll drug use is having on the economies of countries like Thailand is rapidly becoming more severe.

Burma’s drug trade is of particular concern because it has originated and contributed to the rapidly escalating crisis of HIV/AIDS in Southeast Asia.

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<sup>617</sup> See WRS 2005, *supra* note 187.

<sup>618</sup> See International Migration in Thailand, *supra* note 188; *see also* Prospects for Hope?, *supra* note 188.

<sup>619</sup> *See id.*

<sup>620</sup> *See id.*

<sup>621</sup> DEA Report, *supra* note 307.

<sup>622</sup> A Failing Grade, *supra* note 309, at 63. ATS follows different routes than those established by heroin traffickers using inaccessible jungle routes instead.

<sup>623</sup> See GAO Drug Control Report, *supra* note 316; *see also* CFR HIV/AIDS Report, *supra* note 347, at 38, presenting a table depicting the drug trafficking routes from Burma which coincides with the infection spread of the HIV/Aids virus.

<sup>624</sup> International Narcotics Control Strategy Report 2005, *supra* note 310; A Failing Grade, *supra* note 309, at 57.

<sup>625</sup> U.S. Takes Aim at Drugs in Burma, Afghanistan, *supra* note 309.

<sup>626</sup> See A Failing Grade, *supra* note 309, at 105; *see also* International Narcotics Control Strategy Report 2003, *supra* note 312.

<sup>627</sup> S.C. Res. 1076.

## *HIV/AIDS*

The epicenter of the HIV/AIDS virus has “shifted emphatically to Asia,” and Asia is now on the verge of a major crisis.<sup>628</sup> As a result of needle sharing, injecting drug users in Burma have rapidly “spread the epidemic among themselves, and further to their sexual partners and into the general population at large.”<sup>629</sup> The primary strain of the HIV virus present throughout Southeast Asia has conclusively been shown to have originated in Burma, where it followed opium and heroin trafficking routes out of the country. As a result, Thailand, China, and increasingly India have been widely affected by the Burmese HIV/AIDS strain.<sup>630</sup>

The virus is also spreading rapidly due to Burma’s flourishing sex trade.<sup>631</sup> Additionally, rape of village women by infected Tatmadaw soldiers also plays a role in the spread of HIV in Burma, given the grim statistics on the number of women raped by soldiers and the fact that at least 8 percent of soldiers are said to be infected.<sup>632</sup>

The UN Security Council has already acted in response to the general threat that HIV/AIDS could “pose a risk to stability and security” in the world. In 2000, the Security Council adopted Resolution 1308 recognizing HIV/AIDS was “exacerbated by conditions of violence and instability, which increase the risk of exposure to the disease through large movements of people, widespread uncertainty over conditions and reduced access to medical care.”<sup>633</sup> There is little doubt that the internal conflict and the poor medical care in Burma are profoundly contributing to the spread of HIV/AIDS in Burma and throughout the region.

In that resolution, the Security Council concluded that the “importance of a coordinated international response” to the pandemic was necessary, “given its possible growing impact on social instability and emergency situations.”<sup>634</sup> The regime has failed to “cooperate” with international organizations attempting to “create and execute policies for HIV/AIDS prevention” as requested by the Security Council.<sup>635</sup>

Furthermore, the Global Fund has noted that the Government of Burma made it “impossible” for the Fund to continue its HIV/AIDS activities and programs in Burma in a “reasonable way,” leading it to terminate funding.<sup>636</sup> A Global Fund spokesman stated that the Government of Burma “is not allowing international organizations . . . to actually do the work and reach the people in Burma.”<sup>637</sup>

### ***C. Time for UN Security Council Action***

The time is ripe for the Security Council to get involved in Burma. The UN Secretary-General has made countless attempts work with the Government of Burma, only to see the little dialogue that has occurred fail to yield results. Furthermore, associated agencies such as the ILO and the Global Fund have all expressed the futility of their attempts at engaging the regime to address specific problems and issues. Since 1991, the General Assembly and Commission on Human Rights have repeatedly issued resolutions

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<sup>628</sup> Asia Pacific Ministerial Meeting, *supra* note 365.

<sup>629</sup> UNODC Drugs and HIV/AIDS Report, *supra* note 357.

<sup>630</sup> *See id* at 9; *see also* UNODC HIV Report, *supra* note 369, at 9.

<sup>631</sup> Asia Pacific Ministerial Meeting, *supra* note 365.

<sup>632</sup> *See* CFR HIV/AIDS Report, *supra* note 347. *See also* UNODC HIV Report, *supra* note 369 at 9.

<sup>633</sup> UN Security Council Resolution 1308, *supra* note 381 (particularly noting the severity in Africa).

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> *Global Fund Terminates Burma Grants*, BBC NEWS, Aug. 19, 2005; *see also* Global Fund to Fight Aids, Tuberculosis and Malaria, Message from the Secretariat, Aug. 19, 2005.

<sup>637</sup> *Id.*

expressing their “grave concern” over the situation in Burma and highlighting the very issues that have been discussed in this report. Additionally, the General Assembly recently asserted its frustration with the regime, noting that the regime has failed to implement any of the recommendations made by the General Assembly or the Commission on Human Rights during the previous fourteen years.<sup>638</sup>

In short, the United Nations’ efforts to date have failed. This statement is not designed to place blame on any individual or international organization. Indeed, the blame for a lack of progress lies solely with the Government of Burma. Whether the UN can find a way to deal with the Government of Burma is in many respects not only a question for Burma, but a question of the United Nations’ ability to carry out the UN Charter.

Moreover, the situation is not only persisting but deteriorating. Many signs—including the attack on Aung San Suu Kyi in 2003 and her continued detention under house arrest, the regime’s outright refusal to permit certain UN representatives into the country, the regime’s interference with the delivery of humanitarian assistance into the country, and the extreme poverty brought on by the regime’s mismanagement of the economy—point to one conclusion. The Security Council should take action. Not only does the situation in Burma meet the determining factors the Council has cited in the past to ascertain that a “threat to the peace” exists, but the failure of all past interventions makes clear that the Government of Burma now needs to be given a binding obligation to achieve national reconciliation. The Security Council has the authority to act and should exercise this authority in the case of Burma.

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<sup>638</sup> 2005 UN General Assembly Resolution, *supra* note 421 (Expressing grave concern of the “fact that the Myanmar authorities have yet to implement recommendations contained in the aforementioned resolutions adopted by the General Assembly and the Commission on Human Rights” and “the fact that the Myanmar authorities have not permitted the Special Envoy of the Secretary-General for Myanmar to visit for over six months, or the Special Rapporteur to visit for almost twelve months, despite repeated requests.”)

## **Recommendations**

The UN Security Council should adopt a resolution on the situation in Burma in accordance with its authority under Chapter VII of the UN Charter (Article 41) and past Security Council precedents.

The resolution should:

- Outline the major reasons for the Security Council intervention, focusing on the threat to the peace caused by the major issues described in this report;
- Require the Government of Burma to work with the Secretary-General's office in implementing a plan for national reconciliation and a restoration of a democratically-elected government;
- Request the Secretary-General to remain vigorously engaged with the dispute resolution process and require that he report back to the Security Council on a regular basis;
- Urge the Government of Burma to ensure the immediate, safe, and unhindered access to all parts of the country for the United Nations and international humanitarian organizations to provide humanitarian assistance to the most vulnerable groups of the population, including internally displaced persons; and
- Call for the immediate and unconditional release of Aung San Suu Kyi and all prisoners of conscience in Burma.

## **Appendix**

### **Background, Duties, and Operations of UN Security Council**

Charged with the mission of maintaining peace and security between nations, the UN Security Council plays a key role in achieving the United Nations' larger goals of preventing war, upholding human rights, and promoting international political stability.<sup>639</sup> When carrying out its critical duty of maintaining peace and security, the Security Council possesses unparalleled authority to make decisions that may bind both members and non-members of the UN.<sup>640</sup> With this power to harness the political will of the international community and to channel such determinations toward real change, the Security Council is one of if not the most important organization working for international peace and security in modern times. This Appendix provides a concise introduction to the Security Council's structure, duties, and procedures, which is the framework within which the Security Council should act with respect to the situation in Burma.

## ***A. Security Council Overview***<sup>641</sup>

### **1. Composition**

As provided in Article 23 of the UN Charter, the Security Council is composed of fifteen members of the United Nations.<sup>642</sup> The five permanent members of the Security Council—the People's Republic of China, France, the Russian Federation, the United Kingdom and the United States of America—are joined by ten members elected by the General Assembly for two-year terms, five of which are replaced each year.<sup>643</sup> The selection of Security Council members is based not only on geographic representation but also on the significant responsibility of maintaining peace and security, a task designated to each member of the Security Council.<sup>644</sup> The current non-permanent members for 2004-2005 are Algeria, Benin, Brazil, the Philippines, and Romania; and the current non-permanent members for 2005-2006 are Argentina, Denmark, Greece, Japan, and Tanzania.<sup>645</sup> Each member is assigned a specific month to sit as Security Council president.<sup>646</sup>

### **2. Basic Duties and Functions**

The United Nations Charter explains the Security Council's important mission to act on behalf of UN members to maintain peace and security and articulates the Council's powers to do

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<sup>639</sup> See UN Charter, preamble; UN Charter, art. 4, para. 1.

<sup>640</sup> See UN Charter, art. 2, para. 5; art. 25; and art. 49 (binding members); see also UN Charter art. 2, para. 6 (binding non-members to Charter Principles "so far as may be necessary for the maintenance of international peace and security.") As Chapter VII is the main focus of this report, it is important to note this obligation is explicitly reinforced with regard to the finding of a "threat to the peace, breach of the peace, or act of aggression" in which "[t]he Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." UN Charter, art. 49. By contrast, the UN General Assembly can only recommend action. The General Assembly has passed fourteen consecutive resolutions on Burma, which the Government of Burma has disregarded each of these resolutions. See e.g., 2005 UN General Assembly Resolution, *supra* note 421.

<sup>641</sup> See generally, UN Charter, Chapter V.

<sup>642</sup> UN Charter, art. 23, para. 1.

<sup>643</sup> *Id.*, at para. 2.

<sup>644</sup> *Id.*, at para. 1.

<sup>645</sup> Updated membership lists are available at [http://www.un.org/Docs/sc/unsc\\_members.html](http://www.un.org/Docs/sc/unsc_members.html), last visited Sept. 1, 2005. Profiles of ambassadors serving on the Security Council are available at <http://www.globalpolicy.org/security/indexamb.htm>, last visited Sept. 1, 2005.

<sup>646</sup> *Id.* See also, UN Charter, art. 30 (providing the Security Council the ability to "adopt its own rules of procedure, including the method of selecting its President."). For list of past presidents see UN website, available at <http://www.un.org/Depts/dhl/resguide/scpres.htm>, last visited Sept. 1, 2005.

so.<sup>647</sup> The Security Council is empowered with three broad approaches it can utilize to achieve its mission: (1) recommendations to the General Assembly; (2) recommendations to parties in a dispute; and (3) binding decisions.<sup>648</sup> This report focuses on the third approach as the approach most likely to achieve reconciliation in Burma.

Under Chapter VII of the Charter, the Security Council possesses sole authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>649</sup> It may also call on its powers under Chapter VII to “prevent an aggravation of the situation.” In so doing, the Council has broad discretion to use and tailor its enforcement powers on a case-by-case basis.<sup>650</sup> Unlike “recommendations” under Chapter VI,<sup>651</sup> all resolutions and actions made under the Council’s Chapter VII powers bind all members.<sup>652</sup>

The Security Council’s unparalleled binding power and limited membership has created a historical tension with the General Assembly’s full UN membership with respect to the Council’s power to recommend action.<sup>653</sup> The Charter addresses this friction, stating that when the Security Council exercises its power in relation to disputes, the General Assembly may not make any further recommendation regarding that dispute unless the Security Council so requests.<sup>654</sup> Furthermore, the Secretary-General must notify the General Assembly of those

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<sup>647</sup> UN Charter, art. 24, para. 2 (pointing to powers of Chapters VI, VII, VIII, and XII).

<sup>648</sup> See Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (3d ed., 1998), at 18-20 (hereinafter Bailey & Daws). With relation to recommendations to the General Assembly, these include such issues as the admission or expulsion of members (UN Charter, art. 4 and 6); appointment of Secretary-General (UN Charter, art. 97); or issues surrounding the International Court of Justice (see e.g., UN Charter, art. 97 and art. 94, para. 2).

<sup>649</sup> UN Charter, art. 39.

<sup>650</sup> See Danesh Sarooshi, *The United Nations and the Development of Collective Security, The Delegation by the UN Security Council of its Chapter VII Powers*, at 3 (Oxford 1999) (finding that at the initial San Francisco Conference the UN framers deliberately left the Security Council broad discretion to decide, on a case-by-case basis, when to use these powers citing Doc.881, III/3/46, 12 *UNCIO Docs.* 502, 505 (1945).

<sup>651</sup> Chapter VI is not the focus of this report, as the situation in Burma has eclipsed this type of Security Council action: the Government of Burma has already established an extensive history of refusing to respond to non-binding recommendations by UN agencies. Under Chapter VI (“Pacific Settlement of Disputes”), the Security Council “may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute.” UN Charter, art. 34. If it identifies such a situation, the Council, “when it deems necessary,” may assist parties “in the peaceful settlements of disputes to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” UN Charter, art. 33, para. 1 and 2. See *id.*, art. 36, para. 1 (“The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.”); art. 37, para. 2 (“If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.”); and art. 38 (“Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.”). It is generally accepted that recommendations made under this chapter are not binding on UN members. See, e.g., Stefan Talmon, *The Security Council as World Legislature*, AM. J. INT’L L., Vol 99, Jan. 2005, at 175 (discussing the limit of decisions made under Chapter VII to those that are binding citing *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 44, Oct. 2, 1995; *But see* Bailey & Daws at 268 (discussing International Court of Justice Advisory Opinion in *Namibia* case from Jun. 21, 1971).

<sup>652</sup> See Kurt Herndl, *Reflections on the Role, Functions and Procedures of the Security Council of the United Nations*, in *Recueil Des Cours*, Collected Courses of the Hague Academy of International Law 1997, Martinus Nijhoff Publishers, at 323. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 52 (Advisory Opinion of Jun. 21).

<sup>653</sup> See Bailey & Daws, *supra* note 648 at 3-4.

<sup>654</sup> UN Charter, art. 12, para. 1.

matters relative to the maintenance of international peace and security which are being dealt with by the Security Council.<sup>655</sup>

## ***B. Security Council Power Under Chapter VII of the UN Charter***<sup>656</sup>

Chapter VII of the Charter describes the strongest and most effective measures the Security Council may take in upholding its duty to maintain international peace and security.<sup>657</sup> Article 39 empowers the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>658</sup> The Charter does not explicitly define the particular situations that rise to the level of a threat to the peace, a breach of the peace, or an act of aggression. Thus, this purposeful omission provides the Security Council with broad discretion to review the facts and circumstances surrounding disputes on a case-by-case basis to determine whether it should take action pursuant to Chapter VII.<sup>659</sup>

The protection of humanitarian needs and human rights has become increasingly necessary for maintaining peace and security between nations in this modern age where ongoing civil conflict poses transnational consequences to interdependent nations.<sup>660</sup> The goal of protecting humanitarian needs and human rights is explicitly stated in the UN Charter which provides that “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”<sup>661</sup> Thus, the Security Council is empowered to investigate the conditions of particularly disruptive civil strife and to harness its power to decide whether such a situation rises to a threat to the peace, a breach of the peace, or an act of aggression.<sup>662</sup>

The UN has often commented on the transnational effect of conflicts. For example, UN Secretary-General Kofi Annan recently issued a report where he called on all governments to embrace the emerging international norm of a responsibility of all nations to protect victims of human rights abuses:

We must also move towards embracing and acting on the “responsibility to protect” potential or actual victims of massive atrocities. The time has come for Governments to be held to account, both to their citizens and to each other, for

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<sup>655</sup> UN Charter, art. 12, para. 2.

<sup>656</sup> This report does not recommend imposing some of the more intrusive actions authorized by Chapter VII of the Charter.

<sup>657</sup> See UN Charter, art. 40 (delineating the proper use of non-military actions: “measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”) and art. 42 (providing that if measures in art. 41 prove inadequate, the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”).

<sup>658</sup> UN Charter, art. 39.

<sup>659</sup> See Cedric E. Evans, *The Concept of “Threat to Peace” and Humanitarian Concerns*, 5 *TRANSNAT’L L. & CONTEMP. PROBS.* 213, 219 (1995) (citing Leland M. Goodrich & Anne P. Simons, *The United Nations and the Maintenance of International Peace and Security* 352-54 (1995)).

<sup>660</sup> See Lois E. Fielding, *Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, U. DET. MERCY L. REV., Vol. 73, 1995, at 552; see also Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?* FLETCHER F. WORLD AFF., Vol. 17, 1993, at 199.

<sup>661</sup> UN Charter, art. 55, para. c.

<sup>662</sup> See UN Charter, art. 24, para. 1.

respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interests demand no less.<sup>663</sup>

Nevertheless, there is already a clear understanding among the international community that intra-state warfare has transnational effects and, therefore, can by itself threaten international peace and security.<sup>664</sup> It is because of the modern necessity of such a world order that the Security Council has become increasingly active in international relations and in considering situations that pose a threat to the peace under its Chapter VII powers.<sup>665</sup> Encompassed within its power to determine the nature of a threat to the peace, the Council may unilaterally determine when it is necessary to intervene in a dispute.<sup>666</sup> The types of measures the Security Council may take to respond to such a threat are within the Council's sole discretion.<sup>667</sup> As articulated in

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<sup>663</sup> *In Larger Freedom: Towards Development, Security, and Human Rights for All*, Report of the Secretary-General, Mar. 21, 2005, at para. 132 (emphasis added). This statement built on past work of the Secretary-General's High-Level Panel which had been convened in 2004 to "assess current threats to international peace and security", which concluded:

There is a growing recognition that the issue is . . . the "responsibility to protect" of every State when it comes to people suffering from avoidable catastrophe –mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community - with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. . . .

*Follow-up to the Outcome of the Millennium Summit*, Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change, Dec. 2, 2004, at para 201 and 85, pp. 56-7 and 33, A/59/565.

<sup>664</sup> Former Secretary-General Boutros Boutros-Ghali stated at the first-ever Security Council Summit:

Civil wars are no longer civil, and the carnage they inflict will not let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micro-nationalism that resists healthy economic or political integration can disrupt a peaceful global existence. Nations are too interdependent, national frontiers are too porous and transnational realities . . . too dangerous to permit egocentric isolationism.

UN Security Council (1992), Statement of the UN Security Council Summit Meeting, UN Document S/PV.3046, January 31, 1992, pp. 8-10 (speaking to issues of this new world order and the meaning of state sovereignty in this context). Similarly, the International Commission on Intervention and State Sovereignty noted in its final report:

In a few cases, regimes have launched campaigns of terror on their own populations, sometimes in the name of an ideology; sometimes spurred on by racial, religious or ethnic hatred; and sometimes purely for personal gain or plunder. . . . Intra-state warfare is often viewed . . . simply as a set of discrete and unrelated crises occurring in distant and unimportant regions. In reality, what is happening is a convulsive process of state fragmentation and state formation that is transforming the international order itself . . . [T]heir destabilizing effects are felt in the developed world in everything from globally interconnected terrorism to refugee flows, the export of drugs, the spread of infectious disease and organized crime.

*The Responsibility to Protect, Report of the ICISS*, (Dec. 2001) at viii, available at <http://www.iciss.ca/pdf/Commission-Report.pdf>, last visited Sept. 1, 2005.

<sup>665</sup> See generally David Malone, *Decision-Making in the UN Security Council, The Case of Haiti, 1990-1997*, at 22-36 (Oxford 1998).

<sup>666</sup> See Louis B. Sohn, *The Security Council's Role in the Settlement of International Disputes*, AM. J. INT'L L., Vol. 78, 1984, at 403.

<sup>667</sup> See Danesh Sarooshi, *The United Nations and the Development of Collective Security, The Delegation by the UN Security Council of its Chapter VII Powers*, at 4 (Oxford 1999) (considering the situations in which the Security Council may use its Chapter VII powers).

the Charter, whenever the Council “deems necessary,” at “any stage” of a dispute, it may intervene “to ensure prompt and effective action” to safeguard peace and security.<sup>668</sup>

The range of prospective actions the Council may take is delineated in Articles 41 and 42 of the Charter. Under Article 41, the Council may engage in a number of non-military actions, such as the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>669</sup> The Council has utilized more intrusive measures authorized by these articles, such as where it created international criminal tribunals in Yugoslavia (1993) and Rwanda (1994) to deal with the consequences of extreme violence and genocide. On the less intrusive end of the spectrum, the Security Council has limited its actions to the passage of simple and clear resolutions where such action is sufficient to curtail conflicts that threaten peace and security in a region. Section III.B. places the situation in Burma in the context of past Security Council actions to illustrate why it is appropriate for the Council to intervene with a less intrusive resolution.

It is only when all else fails, and in the most extreme circumstances, that Article 42 authorizes the Security Council to engage in military action, such as “demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>670</sup> Understandably, the Security Council has used this power with great restraint, illustrated by the fact that only sixty peacekeeping operations have been employed since the inception of the United Nations.<sup>671</sup> This report does not suggest that such actions are sought or required in Burma. Rather, this report encourages the Security Council to adopt a resolution consistent with its powers under Article 41 of the Charter.

Despite the power to take extreme measures in dire situations, the Charter prohibits the Security Council from intervening in matters “essentially within domestic jurisdiction” of a sovereign nation.<sup>672</sup> Nevertheless, this prohibition does not apply to Security Council action taken to address a threat to the peace, a breach of the peace, or an act of aggression as the Charter states the non-intervention principle “*shall not prejudice the application of enforcement measures under Chapter VII.*”<sup>673</sup> The question of whether a conflict is within a nation’s domestic jurisdiction, therefore, is only relevant where the Security Council determines that neither a case nor its consequences constitutes a threat to the peace, a breach of the peace, or an act of aggression.<sup>674</sup> In other words, when the Security Council determines that a threat to the

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<sup>668</sup> *Id.* See also UN Charter, art. 33, para. 2; art 36, para. 1; art. 24, para. 1.

<sup>669</sup> UN Charter, art. 41.

<sup>670</sup> UN Charter, art. 42.

<sup>671</sup> Updated information regarding current UN peacekeeping missions may be found at <http://www.un.org/Depts/dpko/dpko/index.asp>, last visited Sept. 1, 2005.

<sup>672</sup> UN Charter, art. 2, para. 7.

<sup>673</sup> UN Charter, art. 2, para. 7 (emphasis added); see also Daniel Pickard, When Does Crime Become a Threat to International Peace and Security?, *FLA. J. INT’L L.*, Vol. 12, 1998, at 8.

<sup>674</sup> See Cedric E. Evans, *supra* note 659 at 219. There has also been debate regarding the International Court of Justice as an available check on Security Council action. See generally Babback Sabahi, *The ICJ’s Authority to Invalidate the Security Council’s Decisions Under Chapter VII: Legal Romanticism or Rule of Law?* *NY INT’L L. REV.*, Vol. 17, 2004, at 1; Deborah D’Angelo, *The Check on International Peace: The International Court of Justice and Judicial Review of Security Council Resolutions*, *SUFFOLK TRANSNAT’L L. REV.*, Vol. 23, 561; David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter, Legal Limits and the Role of the International Court of Justice* (2001) Ph.D. (Brill Pub.).

peace exists under Article 39, it may enact enforcement measures without running afoul of non-intervention principles.

### ***C. Operations of the Security Council***

#### **1. Voting**

As dictated by the Charter, each member of the Security Council is allowed one vote.<sup>675</sup> The number of votes needed to pass a particular measure depends on whether the issue in question is procedural or substantive in nature.<sup>676</sup> Any decisions made regarding procedural issues may be made by the affirmative vote of nine members.<sup>677</sup> Decisions on substantive matters, however, such as actions in response to a threat to the peace, require an affirmative vote of nine members, including the concurring (or abstaining) votes of the five permanent members.<sup>678</sup> As a consequence of this requirement, the five permanent members of the Security Council each hold a veto power over substantive decisions.

The issue of whether a particular item or action is procedural or substantive is one of some debate. A discussion surrounding this issue was held at the original UN Conference on International Organization held in San Francisco in April 1945, ultimately leading to the adoption of the Yalta Formula.<sup>679</sup> Discussed more fully below, the inclusion of items on the agenda, the order of items, and the deferment of consideration of items on the agenda are generally understood to be procedural matters which are adopted by a majority vote and are not subject to a veto.<sup>680</sup>

Once an item is on the agenda, any one of the five permanent members may use their veto power to prevent the adoption of any substantive action, including resolutions.<sup>681</sup> The members' ability to veto has been widely debated and is a key issue discussed in relation to reforming the Security Council.<sup>682</sup> Excluded from the scope of the veto are the consideration and discussion of a particular matter.<sup>683</sup> Also, if a permanent member withholds their vote by abstaining, or not being present at a meeting, the veto power is not implicated. Thus, a permanent member may refrain from taking a viewpoint on a particular resolution while still allowing the substantive issue to pass.

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<sup>675</sup> UN Charter, art. 27, para. 1; *see also*, *Security Council's Official Voting Record*, available at

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&menu=search&submenu=power#focus>, last visited Sept. 1, 2005.

<sup>676</sup> The issue of what is procedural versus what is substantive is a discussion in and of itself, but remains outside the scope of this report. *See* Bailey & Daws, *supra* note 10, at 225-7.

<sup>677</sup> *Id.*, at para.2.

<sup>678</sup> *Id.*, at para. 3. (Further noting "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.")

<sup>679</sup> *See* The Yalta Formula on Voting in the Security Council, Jun. 8, 1945, UNCIO, Vol.XI at 710-14 (outlining the framers' intentions as to substantive versus non-substantive questions). *See also* Bailey & Daws, *supra* note 648 at 240-42 (discussing the merits of the "Yalta Formula.").

<sup>680</sup> *See* Bailey & Daws, *supra* note 648, at 226.

<sup>681</sup> *Id.*, at 240-42.

<sup>682</sup> *See e.g.* Global Policy Forum: Articles on the Veto at <http://www.globalpolicy.org/security/veto/articles.htm>, last visited Sept. 1, 2005 (list of opinion and analysis pieces as well as news articles dealing with the debate surrounding the veto).

<sup>683</sup> *See* Bailey & Daws, *supra* note 648, at 227.

Resolutions are customarily adopted by a recorded vote that expresses the position of each member.<sup>684</sup> Press releases are published immediately after Council meetings, which provide the public an unofficial record of any resolutions passed.<sup>685</sup> Official records of the Security Council meetings are available at a later date.<sup>686</sup> Finally, an annual report is published and submitted to the General Assembly.<sup>687</sup>

## **2. Procedure**

The procedures of the Security Council are challenging to understand because they are based on both formal rules and informal precedent. Article 30 of the Charter enables the Security Council to “adopt its own rules of procedure, including the method of selecting its President.” Tasked with formulating these rules, the Executive Committee of the Preparatory Commission was divided into those that favored a strict set of rules, and those that preferred to use practical experience along with more moderate guiding principles.<sup>688</sup> In 1946, after several meetings, the Council adopted sixty Provisional Rules of Procedure (rules), which have sustained only minor changes in the preceding decades, including one additional rule relating to the election of International Court of Justice judges.<sup>689</sup> The recorded evolution of the rules from daily practice is relatively unknown because most debate occurs out of the public eye.<sup>690</sup>

The president presides over meetings of the Council.<sup>691</sup> In conjunction with the rules, the Council has developed a range of customs and types of meetings. The Council may hold public gatherings in the form of formal meetings, debates or briefings; meetings may be either open to the public or closed private gatherings.<sup>692</sup> Under the rules, the president holds the responsibility for convening public meetings.<sup>693</sup>

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<sup>684</sup> See *UN Documentation: Research Guide on Security Council Voting Information*, available at: <http://www.un.org/Depts/dhl/resguide/scvote.htm>, last visited Sept. 1, 2005.

<sup>685</sup> *Id.*; see also, *Global Policy Forum: Veto Use in the UN Security Council, 1946-2004*, at <http://www.globalpolicy.org/security/data/vetogph2.htm>, last visited Sept. 1, 2005 (graphic representation of the exercise of veto by each permanent member).

<sup>686</sup> Meeting records from 1994 to the present are available at <http://www.un.org/Depts/dhl/resguide/scact.htm>, last visited Sept. 1, 2005. Most earlier records can be found through the Official Document System of the United Nations (ODS), available at <http://www.un.org/documents/>, last visited Sept. 1, 2005. The text from all passed resolutions may be found on the Security Council website, available at [http://www.un.org/Docs/sc/unsc\\_resolutions.html](http://www.un.org/Docs/sc/unsc_resolutions.html), last visited Aug. 19, 2005. For more detail, speeches made before the Security Council (and background information) are available at <http://www.un.org/Depts/dhl/resguide/scspeech.htm>, last visited Sept. 1, 2005.

<sup>687</sup> Recent Annual Reports may be found through the Official Document System of the United Nations (ODS), *supra* note 686. Earlier reports can be found at a UN depository library, available at <http://www.un.org/depts/dhl/deplib/countries/index.html>, last visited Sept. 1, 2005.

<sup>688</sup> See Bailey & Daws, *supra* note 648 at 9; see also Benedetto Conforti, *The Legal Effect of Non-Compliance with Rules of Procedure in the UN General Assembly and Security Council*, *AM. J. INT'L L.*, Vol. 63, 1969, at 479.

<sup>689</sup> See generally, *Provisional Rules of Procedure of the Security Council, S/96/Rev.7* (hereinafter Rule). Electronic version available at <http://www.un.org/Docs/sc/scrules.htm>, last visited Sept. 1, 2005. See also, Bailey & Daws, *supra* note 648, at 13-16.

<sup>690</sup> Bailey & Daws, *supra* note 648, at 18.

<sup>691</sup> See Rule 19.

<sup>692</sup> See Glossary of Meetings of the United Nations Security Council, available at [http://www.mfa.gov.sg/unsc/unsc\\_glossary.html](http://www.mfa.gov.sg/unsc/unsc_glossary.html), last visited Sept. 1, 2005 (Singapore Ministry of Finance outline of different types of meetings; also noting gatherings such as informal consultations and meetings and closed consultations of the whole).

<sup>693</sup> See Bailey & Daws, *supra* note 648, at 21.

The Secretary-General has the obligation to bring matters forward for the consideration of the Council.<sup>694</sup> In addition, many items on the agenda may be brought to the attention of the president and other members of Security Council through means of informal gatherings.<sup>695</sup> In some settings, such as “Arria formula” meetings, individuals who are not members may have the opportunity to address the members of the Security Council.<sup>696</sup> Typically, as these meetings are private and informal, no official records are kept.<sup>697</sup> Any state or UN organ or the Secretary-General may propose items for the agenda of the Security Council, and such requests must be “immediately” communicated to representatives on the Council.<sup>698</sup>

The proposed issues to be discussed in a Security Council meeting make their first public appearance in a “provisional agenda” containing “the list of matters suggested for the consideration of the Council at a specific meeting.”<sup>699</sup> Typically, this provisional agenda is then communicated to the Council members within three days of the meeting.<sup>700</sup> When possible, it is also published in the UN Journal.<sup>701</sup> Additions or changes to this provisional agenda may be made up to five days before the meeting or, if “urgent circumstance[s]” are found, may be made during the meeting.<sup>702</sup>

The adoption of the provisional agenda as a formal agenda is the first item discussed at any gathering.<sup>703</sup> If there is contention over a particular agenda item, a country may call for a vote to have the item excluded. Considered a procedural vote, an item will be eliminated unless nine countries vote to keep the item on the agenda. Any items not discussed, or held for discussion at later meetings, are found on the “summary statement of matters of which the Security Council is seized.”<sup>704</sup> This document lists those matters which have not been disposed of at previous meetings, and are communicated to the Council members on a weekly basis.<sup>705</sup>

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<sup>694</sup> See Rule 6.

<sup>695</sup> See generally Bailey & Daws, *supra* note 648, at 60-74.

<sup>696</sup> *Id.* at 73; see also Rules 37, 38 and 39. According to Global Policy Forum scholar James Paul:

The formula is named for Ambassador Diego Arria of Venezuela who devised it. In 1992, during the crisis in former Yugoslavia, a Bosnian priest came to New York and asked to meet with various Council members individually. Only Ambassador Arria agreed to meet him. Ambassador Arria was so impressed with the priest’s story that he felt all Council members should hear it too. Obviously, it was impossible to get the Council to agree to hear this testimony in its official sessions. So Arria simply invited Council members to gather over coffee in the Delegates’ Lounge. Many attended, the meeting was a great success and the Arria Formula was born.

Global Policy Forum, *Arria Formula*, available at <http://www.globalpolicy.org/security/mtgsetc/arria.htm>, last visited Sept. 3, 2005.

<sup>697</sup> *Id.* Recently, UN Special Envoy Anna Tibaijuka spoke to the Security Council regarding the situation in Zimbabwe, which was not on the UN Security Council agenda. The United Kingdom invoked the rule to vote on procedural matters by a simple majority, and was joined by eight other members to discuss Ms. Tibaijuka’s report. See Zimbabwe report discussed at UN, BBC NEWS, Jul. 27, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4721189.stm>, last visited Sept. 1, 2005.

<sup>698</sup> Rule 6.

<sup>699</sup> See Bailey & Daws, *supra* note 648, at 76; see also Rule 7 (this ‘provisional agenda’ is drafted by the Secretary-General and approved by the Council’s president).

<sup>700</sup> Rule 8 (but providing an allowance in urgent circumstances for matter to be communicated simultaneously with the notice of the meeting).

<sup>701</sup> See Bailey & Daws, *supra* note 648, at 76.

<sup>702</sup> *Id.*

<sup>703</sup> *Id.*; Rule 9 and 10.

<sup>704</sup> See Rule 11.

<sup>705</sup> See Bailey & Daws, *supra* note 648, at 76.

The president of the Security Council determines whether to place the matter on the formal agenda by consensus or by a majority vote. As discussed above, although the practice of the Council is not always uniform, it is generally accepted that motions regarding the addition of items to the agenda are procedural, and thus are not open to veto by permanent members.<sup>706</sup> The understanding of a particular action as procedural or substantive often comes down to the vote, and whether the votes of the five permanent members were necessary for passage.<sup>707</sup> Generally, with regard to putting items on the agenda, the record of votes confirms the procedural nature of the matter.<sup>708</sup> Other procedural motions include proposals changing the wording of items (which are usually adopted without vote); including an item on the agenda but postponing consideration; adding an item to the provisional agenda; or changing the order of items on the agenda.<sup>709</sup>

Once an issue such as a draft resolution is on the agenda, the matter is undeniably substantive and is open to the permanent member veto. At this point, the Security Council votes to pass or reject each item in order of its appearance on the agenda. As a practical matter, it is customary to include only one substantive matter on each agenda.<sup>710</sup> In this manner, the Council often avoids procedural delays.<sup>711</sup>

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<sup>706</sup> See Bailey & Daws, *supra* note 648, at 85. This issue was addressed UN Conference on International Organization in San Francisco in April 1945. At this initial meeting, the Soviet representative argued that the veto power should apply to any *discussion* of an item on the agenda. This argument was defeated in discussions with the future permanent members. This understanding was reiterated in the conference plenary sessions in response to queries from smaller states.

<sup>707</sup> The power of the “hidden veto” or “pocket veto” should, however, be mentioned. This situation refers to instances in which a procedural matter is open to a simple majority vote, but permanent member uses the threat of their ultimate veto power to circumvent the passage of the matter. For example, even if one permanent member could not veto the inclusion of an item on the agenda, the threat of an ultimate veto of the final resolution may bring the issue to an premature end. This device is mainly used in private, non-formal meetings; because there are no formal records of such meetings, it is impossible to know the number of hidden vetoes used by the permanent members. See Céline Nahory, *The Hidden Veto*, The Global Policy Forum (May 2004), available at <http://www.globalpolicy.org/security/veto/2004/0519hiddenveto.htm#5>, last visited Sept. 1, 2005; see also Bailey & Daws, *supra* note 648 at 249-50.

<sup>708</sup> See e.g., *UN Security Council Repertoire*, 11 Supplement, Chapter IV (1989-1992) at 5-6 (listing the passage of the inclusion of items on the agenda by a simple majority vote).

<sup>709</sup> See Bailey & Daws, *supra* note 648, at 85.

<sup>710</sup> *Id.*

<sup>711</sup> *Id.*



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### **Cover Photo**

Caption: Mother and child, new arrivals in Mae Ye Tha Karenni refugee camp on the Burma border.  
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